INDIRECT ENCROACHMENT ON FEDERAL AUTHORITY BY THE TAXING POWERS OF THE STATES

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[Reprinted from the Harvard Law Review, Volumes XXXI and XXXII]

NATIONAL TAX ASSOCIATION
195 Broadway
NEW YORK CITY

HARVARD
LAW REVIEW

VOL. XXXI JANUARY, 1918 NO. 3

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MARSHALL'S familiar *dictum* that "the power to tax involves the power to destroy"[1] has the vice, not uncommon among aphorisms, of being only partly true. It implies that where a state may tax at all, it may tax as it pleases. This would mean that those restrictions on the taxing power of the states which are incident to the federal system of government apply only to the subjects which may be selected for taxation and in no way concern the methods by which the amount of any tax is determined. This seems to be the opinion of Marshall, for, in denying the power of a state to include United States bonds among the kinds of property selected for taxation, he said: "If the right to impose the tax exists, it is a right which in its nature acknowledges no limits. It may be carried to any extent within the jurisdiction of the state or corporation which imposes it, which the will of each state and corporation may prescribe."[2]

The questions which the great Chief Justice was discussing called for no such statements. His argument in *McCulloch* v. *Mary-*

[1] McCulloch *v.* Maryland, 4 Wheat. 316, 431 (1819).

[2] Weston *v.* City Council of Charleston, 2 Pet. 449, 466 (1829). See also Marshall's statement in Brown *v.* Maryland, 12 Wheat. 419, 439 (1827): "It is obvious that the same power which imposes a light duty can impose a very heavy one, one which amounts to a prohibition. Questions of power do not depend on the degree to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed."

land[3] and *Weston* v. *City Council of Charleston*[4] was in support of the proposition that a state could levy no tax whatever on an instrumentality of the federal government, even though the particular tax in issue might not appreciably interfere with that government. He was seeking some general rule which would relieve the courts of the necessity of considering the precise economic effect of every tax that came before them. This he found in the doctrine that a state, if it cannot tax a federal instrumentality into impotence, cannot tax it at all. Marshall was designating subject matters which he deemed entirely outside of state authority. He was not considering whether subject matters within the reach of the taxing power of a state could be subjected to whatever methods of assessment the state might choose to apply. His strong federalism, it would seem, would make him loth to assert by explicit decision that, if a state selects a proper subject for taxation, no method of assessment can make the tax an interference with the federal government or an encroachment on any of its powers.

This implication, however, has frequently been drawn from his too terse pronouncement. Many decisions with respect to the taxing power of the states have proceeded on the theory that inquiry need be directed only to the characteristics of the subject matter on which the tax is levied. If the subject is an instrumentality of the federal government, the state tax is invalid as an interference with the necessary effectiveness of that government. If the subject is not an instrumentality of the federal government, the tax cannot be held invalid as an interference with that government. If the subject matter is interstate commerce, the state tax is invalid as a regulation of such commerce. If the subject matter is not interstate commerce, the tax cannot be a regulation of such commerce. Such are the conclusions which find warrant in the language of many of the judges of the Supreme Court. But an examination of the decisions shows that the line of demarcation between valid and invalid state taxes is not so clear and straight as this language implies.

The so-called "subjects" of taxation with which the cases have had to deal have all been within the territorial jurisdiction of the state. They have been privileges granted by the state, or acts

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[3] 4 Wheat. 316 (1819).

[4] 2 Pet. 449 (1829).

done, business conducted or property located within the state. The immunity of the subject from state taxation has been urged, not because it was geographically outside the state's jurisdiction, but because it was legally withdrawn from that jurisdiction by the creation of the federal system of government. The act in question might be an act of interstate commerce. The property might be owned by the United States or consist of the bonds of the United States. It is on the ground that the subject on which the tax is imposed is an agency of the United States or is an agency of interstate commerce, that what is within the territorial jurisdiction of the state is held to be nevertheless outside of its legal jurisdiction.[5]

In discussing questions of legal jurisdiction, the use of such spatial terms as "within" and "without" involves possible confusion. It might be better to say "subject to" and "immune from" the jurisdiction of the state. In this connection "jurisdiction" has the connotation of "legal power to deal with," rather than that of "area within which action may be taken." And "power" must be understood not to refer to power in general, to all kinds of power, but to indicate only the specific exercise of authority in question. The same act or business or property may be immune from one exercise of authority by the state, and subject to other exercises of state power. Thus a state may tax goods from other states still in the original package,[6] but may not forbid their sale.[7] Goods originating in other states become subjects of the taxing jurisdiction of the state into which they are brought, before they become subjects of its police jurisdiction. So a state may not tax bonds of the United States, but may punish their theft or determine disputes as to their ownership. The jurisdiction of the state over any given subject matter cannot be predicated generally.

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[5] *Cf.* Marshall's statement in Brown *v.* Maryland, 12 Wheat. 419, 441 (1827):

"The constitutional prohibition on the States to lay a duty on imports, a prohibition which a vast majority of them must feel an interest in preserving, may certainly come in conflict with their acknowledged power to tax persons and property within their territory. The power, and the restriction on it, though quite distinguishable when they do not approach each other, may yet, like the intervening colours between white and black, approach so nearly as to perplex the understanding, as colours perplex the vision in marking the distinction between them. Yet the distinction exists, and must be marked as the cases arise."

[6] Brown *v.* Houston, 114 U. S. 622, 5 Sup. Ct. Rep. 1091 (1885).

[7] Leisy *v.* Hardin, 135 U. S. 100, 10 Sup. Ct. Rep. 681 (1890).

The question in each case is a specific one, limited to the particular exercise of state authority in issue.

The determination of the question whether any act or business or privilege or property is a subject of interstate commerce or is an agency of the federal government depends of course on its relation to interstate commerce or to the federal government. This relation may be direct or indirect, remote or immediate. The question is often one of degree. A somewhat arbitrary line has to be drawn. In drawing this line in respect to any mooted subject, economic considerations are always pertinent and frequently controlling. The doctrine of Chief Justice Marshall does not exclude economics from use as a test. His own arguments were frequently economic ones.[8] But his doctrine uses the economic test for the single purpose of determining whether the act or business or privilege or property on which the tax is levied is subject to or immune from the exercise of the state taxing power under consideration. If immunity exists, the immunity is complete. The tax is beyond state authority whether the amount imposed is a million dollars or a cent. If, however, the tax falls on an object within the power of the state, the power may be exercised to any extent that the state pleases. The power to tax at all involves the power to tax as the state wills. It is a power which "in its nature acknowledges no limits."

In spite of Marshall's reiteration of this position, it must be borne in mind that his attention was fixed on its negative aspects. Quite probably he assumed that any tax which in fact interfered with the operations of the federal government or encroached on any of its powers must necessarily be one levied on a subject with-

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[8] See, for example, his argument in Brown *v.* Maryland, 12 Wheat. 419, 439 (1827) to establish that a tax on importers selling at wholesale is a tax on imports: "There is no difference, in effect, between a power to prohibit the sale of an article, and a power to prohibit its introduction into the country. The one would be a necessary consequence of the other. No goods would be imported if none could be sold. No object of any description can be accomplished by laying a duty on importation, which may not be accomplished with equal certainty by laying a duty on the thing imported in the hands of the importer." And on page 440: "A duty on imports is a tax on the article, which is paid by the consumer. The great importing States would thus levy a tax on the non-importing States, which would not be less a tax because their interest would afford ample security against its ever being so heavy as to expel commerce from their ports. This would necessarily produce countervailing measures on the part of those States whose situation was less favorable to importation."

drawn from the jurisdiction of the state, *i. e.*, that the effect of the tax determined the nature of the subject on which it was levied. It is not to be credited, for example, that Marshall, if confronted with a situation in which domestic commerce was economically integrated with interstate commerce, would have permitted a tax on the domestic commerce which imposed any serious burden on the interstate commerce. The cases presenting this problem did not arise till long after his day. The press of economic facts has forced Marshall's successors to abandon his theory that a state may levy any tribute it pleases on a subject not immune from its taxing power. Taxes on subjects within the power of the state have been held invalid as regulations of interstate commerce, for the reason that the measure adopted for determining their amount took toll from interstate commerce.[9] No longer is the state taxing power an autocrat even in its own bailiwick. The absolute monarch has become a limited monarch. It has been subjected to the restraint of the maxim: *Sic utere tuo ut alienam non laedas.*

This change of doctrine has thus far been confined to the field of interstate commerce. It has not yet been applied to state taxes on proper subjects which nevertheless tap the value contributed by federal securities. But logically the new principle is as relevant to economic burdens on the federal borrowing power as to those on interstate commerce. The recent increase in the volume of federal securities will compel a reconsideration of any doctrine that permits a state to affect their value indirectly to an extent that it is forbidden to do directly. A review of the origin and development and modification of the notion that the power to tax is one which "in its nature acknowledges no limits" is therefore of more than merely historical or speculative interest.

It is readily apparent that a tax on a subject which is not an agency of interstate commerce or of the federal government may burden that commerce or that government more than other taxes levied directly on such an agency. A tax of one one-hundredth of one per cent on receipts from interstate commerce within the state may affect that commerce so slightly as to be inappreciable.

[9] Western Union Telegraph Co. *v.* Kansas, 216 U. S. 1, 30 Sup. Ct. Rep. 190 (1910); Pullman Co. *v.* Kansas, 216 U. S. 56, 30 Sup. Ct. Rep. 232 (1910); Ludwig *v.* Western Union Telegraph Co., 216 U. S. 146, 30 Sup. Ct. Rep. 280 (1910).

A tax on the franchise to be a domestic corporation whose amount is determined by applying the rate of five per cent to the receipts from interstate commerce within the state may impose a serious burden on that commerce. Yet, under the doctrine that the court will regard only the subject taxed and will pay no attention to the amount of the tax or to the measure by which it is determined, the infinitesimal burden will be held invalid and the serious one sustained. Thus taxes on subjects not themselves interstate commerce or an agency of the federal government may in a practical sense be regulations of that commerce and interferences with the operations of that government. Any purely formal division of subject matters of taxation into two mutually exclusive classes may sustain one tax and abate another though the two are identical in results.

Such formal classification, however, has speculative advantages and doubtless some practical ones. It establishes fairly definite rules and thereby simplifies the task of deciding cases and makes somewhat more certain the law.[10] But these gains may be won at the cost of some of the results which the Constitution is deemed to intend. There are competing considerations here, as in most problems of constitutional interpretation. This explains and also excuses the inconsistencies and contradictions which appear in the judicial treatment of the problem under consideration.

With the taxes which have been held to fall directly on interstate commerce or on instrumentalities of the federal government we are only incidentally concerned. The doctrines of the Supreme Court have been consistent and involve only the difficulty of determining whether the particular subject matter on which each tax is levied is or is not interstate commerce or an instrumentality of the federal government. These questions have provoked difference of opinion among the members of the Supreme Court, but

[10] For eulogies on the merits of this method of marking the dividing line between state and federal powers, see Chief Justice Marshall in McCulloch *v.* Maryland, 4 Wheat. 316, 429–30 (1819), and Mr. Justice Nelson in Bank of Commerce *v.* New York, 2 Black 620, 634 (1863). The Chief Justice says: "If we measure the power of taxation residing in the State by the extent of sovereignty which the people of a single State possess, and can confer on its government, we have an intelligible standard applicable to every case to which the power may be applied." And Mr. Justice Nelson observes that, when the limits between the powers and functions of the state and national governments are ascertained and fixed in accordance with the principles announced by Marshall, "all perplexity and confusion disappear."

all have agreed that a state tax which was levied directly on interstate commerce or on an instrumentality of the federal government was invalid however insignificant its effect.

When, however, we turn to the cases where the subject of taxation has admittedly been within the power of the state, we meet more fundamental differences of attitude. Some have thought that, if the subject taxed was within the zone of state authority, no tax thereon could be a regulation of matters beyond that zone. Others have held that the recognition that the subject was not immune from taxation did not compel the conclusion that the state might devise any method it pleased for determining the amount of the tax. It is the purpose of this article to review these diversities and to indicate as far as possible what considerations at present seem to be regarded by the Supreme Court as controlling.

I

Interferences with Federal Instrumentalities

The doctrine that a state cannot tax an instrumentality of the federal government is not based on any "express provision in the Constitution." It is said to rest "upon necessary implication" and to be "upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government." [11] The soundness of the principle must be universally conceded. The only room for difference of opinion lies in its application.

An examination of the cases in which the doctrine has been applied shows that the Supreme Court has looked only to the subject matter on which the state tax fell. In *Weston* v. *City Council of Charleston* [12] the majority held that the tax in question was imposed directly on securities of the federal government — "on the contract subsisting between the government and the individual" — and was therefore invalid. Mr. Justice Thompson, dissenting, insisted that the tax was on income. After quoting from the "Federalist," he observed that "it never entered into the discriminating mind of the writer referred to that merely investing

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[11] The Collector *v.* Day, 11 Wall. 113, 127 (1871).

[12] 2 Pet. 449 (1829).

property, subject to taxation, in stock of the United States, would withdraw the property from taxation." [13] The property existed before its investment in stock by the national government.

> "In the case now before us, the tax is not direct upon any means used by the government to carry on its operation. It is only a tax upon property acquired through one of the means employed by the government to carry on its operations, *viz.*, the power of borrowing money upon the credit of the United States; and it is not perceived how any just distinction can be made in this respect, between bank stock and stock of the United States; both are acquired through the medium of means employed by the government in carrying on its operations; and both are held as private property; and it is immaterial to the present question in what manner it was acquired." [14]

In illustration of his point, the dissenting justice remarked that, though the states cannot tax the mint, they can tax the money coined at the mint, when held and owned by individuals. And he concluded by saying:

> "The unqualified proposition that a State cannot directly or indirectly tax any instrument or means employed by the general government in the execution of its power, cannot be literally sustained. Congress has power to raise armies, such armies are made up of officers and soldiers, and are instruments employed by the government in executing its powers; and although the army, as such, cannot be taxed, yet it will not be claimed that all such officers and soldiers are exempt from State taxation. Upon the whole, considering that the tax in question is a general tax upon the interest of money on loan, I cannot think it any violation of the Constitution of the United States to include therein interest accruing from stock of the United States." [15]

But against this the majority opinion by Chief Justice Marshall declared that "the tax on government stock is thought by this court to be a tax on the contract, a tax on the power to borrow money on the credit of the United States, and consequently to be repugnant to the constitution." [16] Thus it is clear that the dispute related to the subject which the state had selected for taxation. Mr. Justice Johnson, who also wrote a dissenting opinion, conceded: "If I could bring myself to consider this question in the form in

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[13] 2 Pet. 449, 477–78 (1829).
[14] 2 Pet. 449, 479 (1829).
[15] 2 Pet. 449, 480 (1829).
[16] 2 Pet. 449, 469 (1829).

which it is considered by the majority of the court, I should certainly concur in the opinion that the tax was unconstitutional." [17]

It is rather difficult to regard the tax involved in the Weston Case as a tax on income. The ordinance under which it was levied reads as follows:

". . . the following species of property, owned and possessed within the limits of the city of Charleston, shall be subject to taxation in the manner, and at the rate, and conformably to the provisions hereinafter specified; that is to say, all personal estate, consisting of bonds, notes, insurance stock, six and seven per cent stock of the United States, or other obligations upon which interest has been or will be received during the year, over and above the interest which has been paid (funded stock of this State, and stock of the incorporated banks of this State and the United States Bank excepted), twenty-five cents upon every hundred dollars." [18]

The most natural inference from this language is that the tax is on property from which income is received, with a deduction allowed to the taxpayer of an amount equivalent to that on which he may be paying interest. The decision stands for the proposition that the subject of taxation in question is not some abstract concept of property distinct from the specific kinds of property which the taxpayer may hold, but is that specific property. If that property is an obligation of the United States to pay money, it is an agency of the United States, since it is the concrete expression of the power to borrow. Any tax on such agency is wholly outside the power of the state.

This doctrine with regard to property was later applied in *Bank of Commerce* v. *New York City* [19] to the capital of a corporation. The statute there provided that the capital stock of every corporation liable to taxation shall be assessed at its actual value. Mr. Justice Nelson, in refuting the contention that *Weston* v. *City Council of Charleston* [20] was not in point because in that case there was discrimination against the stock of the United States, laid down the doctrine that a "court may appropriately determine whether property taxed was or was not within the taxing power, but if within, not that the power has or has not been discreetly exercised." [21] Therefore, he says, the Weston Case necessarily

[17] 2 Pet. 449, 472 (1829).
[18] 2 Pet. 449, 450 (1829).
[19] 2 Black 620 (1862).
[20] Note 4, *supra*.
[21] 2 Black 620, 631 (1862).

decided that the state could not tax federal securities at all, even though it taxed all other securities as well.

After the Bank of Commerce decision, New York changed its statute, so as to read: "All banks, banking associations, etc., shall be liable to taxation on a valuation equal to the amount of their capital stock paid in, or secured to be paid in, and their surplus earnings, etc." [22] In *Bank Tax Case* [23] the Supreme Court held that this tax also was on the capital and therefore on the property in which the capital was invested, and that, in so far as this property consists of stocks of the United States, the case is indistinguishable from the Bank of Commerce Case. Mr. Justice Nelson in the opinion for a unanimous court thus identified the capital of the corporation with the property in which it was invested:

> "Now, when the capital of the banks is required or authorized by the law to be invested in stocks, and, among others, in United States stock, under their charters or articles of association, and this capital thus invested is made the basis of taxation of the institutions, there is great difficulty in saying that it is not the stock thus constituting the *corpus* or body of the capital that is taxed. It is not easy to separate the property in which the capital is invested from the capital itself. It requires some refinement to separate the two thus intimately blended together. The capital is not an ideal, fictitious, arbitrary sum of money set down in the articles of association, but, in the theory and practical operation of the system, is composed of substantial property, and which gives value and solidity to the stock of the institution. It is the foundation of its credit in the business community. The Legislature well knew the peculiar system under which these institutions were incorporated, and the working of it; and, when providing for a tax on their capital at a valuation, they could not but have intended a tax upon the property in which the capital had been invested. We have seen that such is the practical effect of the tax, and we think it would be doing injustice to the intelligence of the legislature to hold that such was not their intent in the enactment of the law." [24]

The succeeding sentence of the opinion foreshadows the distinction which the court is soon to draw. The learned justice states that he has looked through all the statutes of New York relating to the

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[22] Quoted in Bank Tax Case, 2 Wall. 200, 206 (1865).

[23] 2 Wall. 200 (1865).

[24] 2 Wall. 200, 208–09 (1865). For another statement to the same effect see note 169, *infra*.

taxation of moneyed corporations from 1823 to the statute under review, and notes that "it will be seen in all of them that the tax is imposed on the property of the institutions, as contradistinguished from a tax on their privileges or franchises." [25]

1. *Taxes on Privileges*

Four years later the court decided three cases [26] in which the majority held that the tax was not on property but on the franchise to be a corporation, and that it was therefore valid in spite of the fact that it was measured in part by property invested in federal securities. Chief Justice Chase and Justices Miller and Grier dissented, being of the opinion that the tax was a tax on the property and not on the franchises and privileges of the corporation.

Two of the cases were from Massachusetts. The Massachusetts court had declared that, if the taxes were on property, they were invalid under the state constitution. That court, however, sustained the taxes as on "commodities" under the somewhat peculiar interpretation put on that term contained in the Massachusetts constitution. The definition of "commodities" uniformly given by the Massachusetts court was that it signifies "convenience, privilege, profit and gains." [27] Mr. Justice Clifford for the majority of the Supreme Court ruled that the decisions of the state court "must be regarded as conclusive authorities that the tax in this case is a tax on the privileges and franchises of the corporation and not a tax on the property." [28] The minority evidently saw no ground on which to hold the taxes unconstitutional except the denial that the subject of taxation was a privilege.

The two cases differed slightly from each other. *Provident Savings Institution* v. *Massachusetts* [29] involved a requirement that all institutions for savings incorporated under the laws of the state shall pay "a tax on account of their depositors of three-fourths of one per cent per annum on the amount of their deposits." [30]

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[25] 2 Wall. 200, 209 (1865).

[26] Society for Savings *v.* Coite, 6 Wall. 594 (1868); Provident Savings Institution *v.* Massachusetts, 6 Wall. 611 (1868); Hamilton Manufacturing Co. *v.* Massachusetts, 6 Wall. 632 (1868).

[27] 6 Wall. 632, 640 (1868).

[28] 6 Wall. 611, 628 (1868).

[29] 6 Wall. 611 (1868).

[30] 6 Wall. 611, 620 (1868).

Hamilton Manufacturing Co. v. *Massachusetts*[31] had to do with a statute requiring certain classes of corporations to pay, in lieu of all other taxation, a tax of one and one-sixth per cent on the excess of the market value of their capital stock over the value of their real estate and machinery. The complaining corporation was denied exemption for the part of that excess value which was contributed by $300,000 of United States bonds owned by it. The Provident Savings Institution was denied any deduction from its $8,047,652.19 of deposits on account of $1,327,000 invested in the public funds of the United States. On the same day, in *Society for Savings* v. *Coite*,[32] the court declined to permit a Connecticut savings bank to deduct from a tax of one half of one per cent on its deposits of $4,758,273.37 the sum of $500,161 which "was then invested and held in securities of the United States, declared by act of Congress to be exempt from taxation."[33]

The Connecticut corporation had no capital stock, which seemed to be regarded by Mr. Justice Clifford as significant in establishing that the tax could not be one levied on property. In the Provident Savings Case the learned justice makes the questionable assertion that "there is no necessary relation between the average amount of the deposits and the amount of property owned by the institution."[34] In that case also he said: "The amount of the tax does not depend on the amount of the property held by the institution, but it depends upon the capacity of the institution to exercise the privileges conferred by the charter."[35] He seems to be assuming that uninvested deposits of the bank are for some reason not property of the bank. Manifestly a corporation without capital stock may still have legal title to property, and a tax demanded from the corporation may be levied either on its property or on its franchise as the state chooses. The Massachusetts taxes were plainly intended to be levied on the franchises as "commodities." But the Connecticut statute is substantially similar in wording to that held in *Bank Tax Case*[36] to be one imposing a tax on property. The New York statute involved in that case said that the banks "shall be liable to taxation on a valuation equal to" capital stock and surplus; the Connecticut statute said

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[31] 6 Wall. 632 (1868).
[32] 6 Wall. 594 (1868).
[33] 6 Wall. 594, 604 (1868).
[34] 6 Wall. 594, 631 (1868).
[35] 6 Wall. 594, 630 (1868).
[36] Note 23, *supra*.

that the banks shall pay to the state "a sum equal to" a certain percentage of their deposits. Neither statute specifically named the franchise as the subject of taxation. Nor does it seem that the decision of the Massachusetts court holding that the taxes imposed by its statute were not property taxes, as that term is used in the state constitution, is necessarily conclusive of the "subject" on which the tax is levied from the standpoint of its effect on instrumentalities of the federal government. If the test of whether or not the tax is an interference with a federal instrumentality is the "subject" on which the tax is levied, the federal Supreme Court ought to determine independently any dispute as to what that subject is. Otherwise a state by mere use of words can decide for itself whether or not it is interfering with the federal government. Yet this very power on the part of the state is inherent in the doctrine that, in determining whether a tax encroaches on federal authority, the court will look only to the subject taxed and will not regard the economic effect of the measure by which the amount of the tax is determined.

Such, nevertheless, is the doctrine clearly implied by Chief Justice Marshall and specifically sanctioned by the actual decisions in the three cases under review. Corporate franchises, says Mr. Justice Clifford, are legal estates, and not mere naked powers granted to a corporation. They are "as much the legitimate subjects of taxation as any other property of the citizens within the sovereign power of the State." [37]

> "All trades and avocations by which the citizens acquire a livelihood may also be taxed by the State for the support of the State government. Power to that effect resides in the State independent of the Federal government, and is wholly unaffected by the fact that corporation or individual has or has not made investments in Federal securities. Unless such be the rule, the two systems of government, State and Federal, cannot both continue to exist, as the States will be left without any means of support or of discharging their public obligations." [38]

And with respect to the Connecticut statute he says:

> "Reference is evidently made to the total amount of deposits on the day named, not as the subject-matter for assessment, but as the basis for computing the tax required to be paid by the corporation defendants. They enjoy important privileges, and it is just that they should con-

[37] 6 Wall. 594, 638 (1868).

[38] 6 Wall. 594, 638–39 (1868).

tribute to the public burdens. . . . Existence of the power is beyond doubt, and it rests in the discretion of the legislature whether they will levy a fixed sum, or if not, to determine in what manner the amount shall be ascertained." [39]

These three decisions were the basis of *Home Insurance Co.* v. *New York* [40] which held that a tax on a corporate franchise, whose amount is determined by applying to the corporate stock the statutory rates for each one per cent of dividend declared, may include in this measure that part of the capital stock which is invested in United States bonds and the dividends thereon. Mr. Justice Field states the legal principle as follows:

"The validity of the tax can in no way be dependent upon the mode which the State may deem fit to adopt in fixing the amount for any year which it will exact for the franchise. No constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privileges it bestows. It may well seek in this way to increase its revenue to the extent to which it has been cut off by exemption of other property from taxation. As its revenues to meet its expenses are lessened in one direction, it may look to any other property as sources of revenue, which is not exempted from taxation. Its action in this matter is not the subject of judicial inquiry in a federal tribunal." [41]

Here seems to be a definite statement that, if the state finds that the capital of the bank as property is exempt from taxation because invested in federal securities, it may make good its loss from this source by taxing the franchise and basing the amount of the tax on the same capital held immune from the former tax.[42] And yet earlier in this very opinion it is declared:

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[39] 6 Wall. 594, 608 (1868).

[40] 134 U. S. 594, 10 Sup. Ct. Rep. 593 (1889).

[41] 134 U. S. 594, 600, 10 Sup. Ct. Rep. 593 (1889).

[42] This distinction between taxes directly on property and taxes on franchises measured by the value of property has been applied in determining whether federal taxes were interferences with the powers of the states. In Pollock *v.* Farmers' Loan & Trust Co., 157 U. S. 429, 15 Sup. Ct. Rep. 673 (1895), it was held that a general federal tax on incomes could not apply to incomes from state and municipal securities, because this would be an interference with the powers of the states. But in Flint *v.* Stone Tracy Co., 220 U. S. 107, 165, 166 (1911), the federal tax on corporations measured by their income was held valid as an excise tax, and in assessing the amount of the tax the court allowed the inclusion of income from state securities. The argument to the contrary was said to confuse "the measure of the tax upon the privilege

"Nor can this inhibition upon the States be evaded by any change in the mode or form of the taxation provided the same result is effected — that is, an impediment is thereby interposed to the exercise of a power of the United States. That which cannot be accomplished directly cannot be accomplished indirectly. Through all such attempts the court will look to the end sought to be reached, and if that would trench upon a power of the government, the law creating it will be set aside or its enforcement restrained." [43]

It is hardly surprising that such inconsistencies met with dissent. Very simply and without argument Mr. Justice Miller expresses his disagreement:

"Mr. Justice Harlan and myself dissent from the judgment in this case, because we think that, notwithstanding the peculiar language of the Statute of New York, the tax in controversy is, in effect, a tax upon bonds of the United States held by the insurance company." [44]

The doctrine of the absolute power of the state over taxation of corporate privileges was later applied to taxation of inheritances. In *United States* v. *Perkins*,[45] it was held, Mr. Justice Harlan alone dissenting, that a state may tax a bequest to the federal government, since the tax is not upon the property itself, but upon its transmission by will or descent. It is "in reality a limitation upon the power of a testator to bequeath his property to whom he pleases, a declaration that, in the exercise of that power, he shall contribute a certain percentage to the public use." [46] The statute

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with direct taxation of the state or of the thing taxed." After referring to the Home Insurance Case, Mr. Justice Day, speaking for a unanimous court, declared:

"It is therefore well settled by the decisions of this court that when the sovereign authority has exercised the right to tax a legitimate subject of taxation as an exercise of a franchise or privilege, it is no objection that the measure of taxation is found in the income produced in part from property which of itself considered is non-taxable. Applying that doctrine to this case, the measure of taxation being the income of the corporation from all sources, as that is but the measure of a privilege tax within the lawful authority of Congress to impose, it is no valid objection that this measure includes, in part at least, property which, as such, could not be directly taxed. . . .

". . . There is no rule which permits a court to say that the measure of a tax for the privilege of doing business, where income from property is the basis, must be limited to that derived from property which may be strictly said to be actively used in the business."

[43] 134 U. S. 594, 598, 10 Sup. Ct. Rep. 593 (1889).

[44] 134 U. S. 594, 607, 10 Sup. Ct. Rep. 593 (1889).

[45] 163 U. S. 625, 16 Sup. Ct. Rep. 1073 (1896).

[46] 163 U. S. 625, 628, 16 Sup. Ct. Rep. 1073 (1896).

was said not to be an attempt to tax the property of the United States, "since the tax is imposed upon the legacy before it reaches the hands of the government."[47] This is a somewhat novel use of the doctrine that time may be of the essence. Here again the court looks at what was taxed, entirely disregarding where the burden fell.[48]

Ten years later it was held in *Plummer* v. *Coler*,[49] Mr. Justice White alone dissenting, that a state inheritance tax may lawfully be imposed on the bequest to an individual of a life interest in United States bonds. The principle underlying this decision was thus stated by Mr. Justice Shiras:

> "We think the conclusion, fairly to be drawn from the State and Federal cases, is, that the right to take property by will or descent is derived from and regulated by municipal law; that, in assessing a tax upon such right or privilege, the State may lawfully measure or fix the amount of the tax by referring to the value of the property passing; and that the incidental fact that such property is composed, in whole or in part, of Federal securities, does not invalidate the tax or the law under which it is imposed."[50]

Counsel for the legatee in this case had urged upon the court the economic argument:

> "The States have no power to inpose any tax or other burden which would have the effect to prevent or hinder the government of the United States from borrowing such amounts of money as it may require for its purposes, on terms as beneficial and favorable to itself, in all respects, as it could do if no such tax were imposed by the State."[51]

To this Mr. Justice Shiras answered that the recognition of the doctrine would require the overruling of earlier decisions.

> "For, if it were our duty to hold that taxation of inheritances, in the cases where United States bonds pass, is unlawful because it might in-

[47] 163 U. S. 625, 630, 16 Sup. Ct. Rep. 1073 (1896).

[48] See United States *v.* Fox, 94 U. S. 315 (1877), holding that a state may forbid a devise of land to the United States. It is held also that a federal inheritance tax may be applied to a legacy to a municipal corporation, Snyder *v.* Bettman, 190 U. S. 249, 23 Sup. Ct. Rep. 803 (1903). But a federal income tax cannot be applied to income received by a city, United States *v.* Baltimore & Ohio Railroad Co., 17 Wall. 322 (1873).

[49] 178 U. S. 115, 20 Sup. Ct. Rep. 829 (1900).

[50] 178 U. S. 115, 134, 20 Sup. Ct. Rep. 829 (1900).

[51] 178 U. S. 115, 119, 20 Sup. Ct. Rep. 829 (1900).

juriously affect the demand for such securities, it would equally be our duty to condemn all State laws which would deter those who form corporations from investing any portion of the corporate property in United States bonds." [52]

He went on further to argue that the effect of the inheritance tax in question on the federal borrowing power is less serious than that of the franchise taxes which have been sustained, since, on account of the low interest yield, only a few individuals invest in United States bonds. Mention is made also of the fact that "no inconsiderable portion of the United States loans is taken and held, as everyone knows, in foreign countries, where doubtless it is subjected to municipal taxation." [53]

"While we cannot take judicial notice of the comparative portions of the government securities held by individuals, by corporations, and by foreigners, we still may be permitted to perceive that the mischief to our national credit, so feelingly deplored in the briefs, caused by State taxation upon estates of decedents, would be inappreciable, and too remote and uncertain to justify us now in condemning the tax system of the State of New York." [54]

Thus the economic argument is relied on to show that the legal doctrine of determining taxability or non-taxability according to the subjects on which the tax is levied does not cause the serious economic injury to federal authority that is contended. The facts adduced in support of the position are facts which change with time. The argument does not directly meet the contention of counsel

". . . that individual persons will be driven to consider, when making their investments, whether they can rely on their legatees or heirs receiving United States bonds unimpaired by state action in the form of taxation; and that if it should be held by this court that such taxation is lawful, capital would not be invested in United States bonds on terms as favorable as if we were to hold otherwise." [55]

Nor can the contention be dismissed by economic argument. Mr. Justice Shiras is entirely correct in saying that the same contention would require the overruling of earlier decisions sustaining taxes on corporate franchises. He must therefore be understood

[52] 178 U. S. 115, 136, 20 Sup. Ct. Rep. 829 (1900).
[53] *Ibid.* [54] *Ibid.* [55] *Ibid.*

as declaring that the mere fact that federal securities would be more advantageously disposed of, if they must always be excluded from every computation to determine the amount of a tax, does not make the tax in a legal sense a burden on a federal instrumentality.

The contention of counsel confuses two questions. One is whether the market for federal securities is less favorable after the state tax than before. The other is whether the market for federal securities is more favorable if the tax takes toll from all other investments but not from federal securities. There can be no doubt as to the economic answer to the second question. Plainly, if the tax is declared inapplicable in any form to federal securities, the relative position of those securities in the market is improved. The result of imposing burdens on competing securities and leaving federal securities free is to confer a benefit upon the latter. This is what happens when non-discriminatory state taxes are held inapplicable to federal securities. But whether the state tax on franchises or on inheritances, if measured indiscriminately by all investments, really hurts the federal borrowing power more than if no such taxes were levied at all is a more difficult question. It is a question which the abandonment in 1910 of the doctrine that a tax on a proper subject can never be an encroachment on federal authority [56] may force upon the consideration of the court. Mr. Justice Holmes, who opposed the abandonment of this doctrine, made the point that any effect on interstate commerce of a complete prohibition against economically related domestic commerce is really not a burden, but simply the denial of a collateral benefit. "If foreign commerce," he said, "does not pay its way by itself, I see no right to demand [for the foreign corporation] an entrance for domestic business to help it out." [57] So also it may be urged that, if federal instrumentalities are not actually impeded by a state tax, there should be no right to claim for them a collateral benefit from the operation of state laws. If the court abandons the test of "subjects" in cases where the tax falls on what has been held a proper subject, it may abandon it also where the tax falls on what has been held to be an improper subject. If it turns from somewhat artificial legal distinctions to practical economic considerations, it may

[56] See cases cited in note 9, *supra*.

[57] 216 U. S. 56, 76, 30 Sup. Ct. Rep. 232 (1909).

examine afresh the whole topic. This possibility will be discussed after the cases on interstate commerce have been dealt with. It is of course obvious that the frank substitution of the test of economic effect for that of the legal subject on which the tax is levied will not necessarily establish rules that will validate the kind of taxation previously held unconstitutional.

2. *Taxes on Property*

In the foregoing cases the essential basis of the decision is that the state was imposing the tax on a privilege which it might have withheld entirely and which therefore it may tax as it pleases. The subject taxed came into existence only by grace or favor of the state, and the state by taxing its own creature cannot be interfering with an instrumentality of the United States. The same reason would support state taxation of the full value of shares of corporate stock in domestic corporations with no deduction for such part of that value as may be represented by corporate investment in federal securities. The decisions in favor of such taxation, however, have been based on the somewhat broader ground that a tax on the share is not a tax on the property of the corporation and therefore not on the federal securities in which some or all of that property may be invested.

The point was first involved in *Van Allen* v. *Assessors*,[58] which held that the state could tax shares of stock in national banks though the capital of the banks was all invested in stocks and bonds of the United States. This decision, however, was based on an interpretation of a congressional statute permitting the taxation of the shares. The majority were of opinion that the statute meant that the state might tax the shares at their full value. The minority, on the other hand, thought that the only purpose of the statute was to preclude the inference that the shares must be entirely exempt from state taxation on account of the functions performed by the banks as instruments of the national government, and that it had no bearing on the question whether the value assigned to the shares might include such as they derived from the federal securities in which the capital of the bank was invested. Chief Justice Chase, who, with Justices Wayne and Swayne dis-

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[58] 3 Wall. 573 (1866).

sented, referred to the decisions holding that a tax on the capital of a bank must not include such part of that capital as is invested in federal securities,[59] and declared that the same principle should be applied to a tax on the shares. If the contrary were admitted, he said:

> "It would follow that the legislature of New York by merely shifting its taxation from the capital to the shares, might have avoided the whole effect of the exemptions sanctioned by the decisions just cited. The same tax on the same identical property, without any exemption of national securities, might have been assessed and collected by adopting the simple expedient of assessment on the shares of capital, instead of on the aggregate of capital — on the parts instead of on the whole. . . .
>
> We do not understand the majority of the court as asserting that shares of capital invested in national securities could be taxed without authority from Congress. We certainly cannot yield our assent to any such proposition. To do so would, in our judgment, deprive the decisions just cited of all practical value and effect, and make the exemption from State taxation of national securities held by banks as investment of capital, wholly unreal and illusory." [60]

And to this he added: "It may well be questioned, in our judgment, whether Congress has power under the Constitution to authorize state taxation of national securities, either directly or indirectly." [61] Thus the dissenting judges clearly indicated their conviction that, though the shares might be a proper subject of taxation, the state could not, in assessing their value for this purpose, adopt a measure which would result in imposing on federal securities the same burden as a direct levy on those securities. This position, however, has not met with sanction in later decisions.

In *Cleveland Trust Co.* v. *Lander* [62] the contention was made that a tax on the shares of stock in a bank chartered by the state "being equivalent to a tax on the property of the trust company, there must be deducted from the value of the shares that portion of the

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[59] Bank of Commerce *v.* New York City, note 19, *supra;* Bank Tax Case, note 23, *supra.*

[60] 3 Wall. 573, 593 (1866).

[61] *Ibid.*

[62] 184 U. S. 111 (1902). The reporter states that "Mr. Justice Harlan did not hear the argument, and took no part in the decision." There was no dissent in the case. Chief Justice Chase and Justices Wayne and Swayne who dissented in the Van Allen Case, note 58, *supra,* were no longer on the bench.

capital of the company invested in United States bonds." [63] The court answered that "the contention destroys the separate individuality recognized, as we have seen, by this court, of the trust company and its shareholders." [64] There was a *non-sequitur* in basing this decision, as the court did, on the Van Allen Case, for the federal statute interpreted as sanctioning the taxation of shares in national banks at their full value has no necessary bearing on the taxation of shares in state banks. It was still open for the court to say that the question before it involved general principles inherent in the federal system of government. Without questioning the Van Allen Case it might have held that, though shares in state banks were proper subjects of state taxation, the state must exclude from their value such part as was contributed by the federal securities owned by the bank, since otherwise the state would by indirection impose on the federal borrowing power, burdens which had been held unconstitutional when imposed directly. But the court was regarding the subject on which the tax fell and not the elements of value in the measure by which its amount was determined. As pointed out earlier, the opinion made no mention of any power which the state had over these shares by reason of the fact that they were shares in a domestic corporation which the state might have declined to create. It seems clear that the court would have applied the same doctrine to an Ohio tax of shares in a corporation created by a sister state.[65]

The distinction set forth in the Van Allen Case and followed in *Cleveland Trust Co.* v. *Lander* was grudgingly recognized in *Home Savings Bank* v. *Des Moines*.[66] This case involved an Iowa statute which provided that shares of stock in state banks should be assessed to the banks and not to the individual stockholders. The majority held that the tax was imposed on the property of the bank and not on that of the stockholders, and that therefore the value of United States bonds owned by the bank must be deducted from the assessment.[67] It was conceded in the opinion that a contrary

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[63] 184 U. S. 111, 114–15, 22 Sup. Ct. Rep. 394 (1902).

[64] 184 U. S. 111, 115 (1902). In Mead *v.* Commissioners, dealt with in the opinion in People *ex rel.* Duer *v.* Commissioners of Taxes, 4 Wall. 244 (1867) the same point had been decided. See p. 353, *infra*.

[65] See Sturges *v.* Carter, 114 U. S. 511, 5 Sup. Ct. Rep. 1014 (1885).

[66] 205 U. S. 503, 27 Sup. Ct. Rep. 571 (1907).

[67] In reaching this interpretation reliance was placed on the difference between

conclusion as to the subject on which the tax was levied would have required a contrary decision under the doctrine of the Van Allen Case. But Mr. Justice Moody gives the impression that he thinks the Van Allen Case was wrongly decided. Referring to that case he says:

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the method of taxing shares in state banks and that of taxing shares in national banks. With respect to the latter, the Iowa statute provided that they should be "assessed to the individual stockholders at the place where the bank is located." Though the national banks, like the state banks, were liable for the payment of the taxes, the national banks were given a right of reimbursement from the stockholders, and were given a lien on the stock and unpaid dividends, with authority to sell the stock to satisfy the lien in case the dividends were not sufficient to furnish reimbursement for the tax. No such right of reimbursement was given to the state banks, and the court believed that they could not have "by any possibility a common-law right to recover the tax paid from the shareholders." Continuing, the opinion declared: "The law imposes no obligation on the shareholder. In paying the tax the corporation has paid its own debt, and not that of others, and there is nothing in such payment from which the law can imply a promise of reimbursement. These taxes, therefore, are not to be paid by the banks as agents of their stockholders, but as their own debt, and, unless it is supposed that the law requires them to pay taxes upon property which they do not own, the taxes must be regarded as taxes upon the property of the banks."

In the brief for the state it was insisted that the Supreme Court must accept as binding the interpretation put upon the state statute by the state court. This was the contention which Mr. Justice Clifford accepted in Hamilton Manufacturing Co. *v.* Massachusetts (see p. 331, *supra*). In the Des Moines Case Mr. Justice Moody does not directly meet the contention. After stating his conclusion that the tax is on the property of the banks, he says: "This we think is consistent with the interpretation of the law by the supreme court of Iowa, which sustained the tax on grounds which will presently be considered." Those grounds are that the tax is on the shares and not on the property of the bank. In the final paragraph of the opinion, the learned justice says: "We regret that we are constrained to differ with the supreme court of the state on a question relating to its law. But, holding the opinion that the law directly taxes national securities, our duty is clear." Thus plainly the Supreme Court rejects the interpretation of the state court as to the subject on which the tax was levied.

Mr. Justice Moody makes it clear that the question of the subject on which the tax is imposed is not answered by ascertaining the person from whom payment is required. He expressly declares his approval of First National Bank *v.* Kentucky, 9 Wall. 353 (1870), and the cases following it, which hold that a tax on the shares is not to be "deemed a tax on the capital of the bank, because the law requires the officers of the bank to pay this tax on the shares of its stockholders." These cases hold also that requirement of such payment from a national bank is not an interference with the bank as an instrumentality of the national government. But all the cases with respect to state taxation affecting national banks are controlled by the congressional permission (15 Stat. at L. 34, chap. 7) that the real estate of the banks and the shares of their stockholders may be taxed by the states. See Talbott *v.* Silver Bow County Commissioners, 139 U. S. 438, 11 Sup. Ct. Rep. 594 (1891), and Owensboro National Bank *v.* Owensboro, 173 U. S. 664, 19 Sup. Ct. Rep. 597 (1899).

"In an opinion in which Justices Wayne and Swayne joined, Chief Justice Chase dissented from the judgment upon the ground that taxation of the shareholders of a corporation in respect to their shares was an actual though an indirect tax on the property of the corporation itself. But the distinction between a tax upon shareholders and one on the corporate property, although established over dissent, has come to be inextricably mingled with all taxing systems, and cannot be disregarded without bringing them into confusion which would be little short of chaos." [68]

The Van Allen Case is accepted as having "settled the law that a tax upon the owners of shares of stock in corporations, in respect of that stock, is not a tax upon United States securities which the corporation owns." [69] The result of the various decisions is said to be that "although taxes by states have been permitted which might indirectly affect United States securities, they have never been permitted in any case except where the taxation has been levied upon property which is entirely distinct and independent from these securities." [70] The fact that a tax on the corporation "measured by the value of the shares in it" is "equivalent in its effect to a tax (clearly valid) upon the shareholders in respect of their shares" [71] is dismissed as immaterial.

"But the two kinds of taxes are not equivalent in law, because the State has the power to levy one, and has not the power to levy the other. The question here is one of power, and not of economics. If the State has not the power to levy this tax, we will not inquire whether another tax, which it might lawfully impose would have the same ultimate incidence." [72]

The statement that the question is "one of power, and not of economics" invites analysis. Mr. Justice Moody makes it to dismiss the contention that the tax before him imposes no more serious burden on the borrowing power of the federal government than do other taxes held lawful. But at the same time he seems to imply that because of the economic effects it would have been wise not to permit those taxes on shares which have taken account of the value due to federal securities owned by the corporation.

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[68] 205 U. S. 503, 518, 27 Sup. Ct. Rep. 571 (1907).

[69] *Ibid.*

[70] 205 U. S. 503, 519, 27 Sup. Ct. Rep. 571 (1907).

[71] *Ibid.*

[72] Note 71, *supra.*

The final paragraph of his opinion might have been applied equally well to the cases involving taxation of shares.

> "If by the simple device of adopting the value of corporation shares as the measure of the taxation of the property of the corporation, that property loses the immunities which the supreme law gives to it, then national securities may easily be taxed whenever they are owned by a corporation, and the national credit has no defense against a serious wound."[73]

Yet Iowa by changing its statute and assessing these shares of stock to the stockholders might inflict this very wound. Mr. Justice Moody employs an economic argument to show that the tax on shares assessed to the corporation is as serious an interference with the federal borrowing power as is a tax on the capital of the bank. Though he declines to use the economic argument to put the tax before the court in the class of those that have been held invalid, he relies on economic considerations to reinforce his conclusion that it properly belongs with those that have been held invalid.

3. *Taxes Discriminating against Federal Instrumentalities*

One further possibility of indirect encroachment on the federal borrowing power remains to be considered. It is settled that the franchises of domestic corporations and the shares in state and national banks are subject to taxation with no diminution in the assessment of their value by reason of corporate investment in United States bonds. Suppose a state devises some plan whereby the franchises and the stock of corporations owning United States bonds are taxed more heavily than those of corporations having no such investments. Suppose it discriminates against such stock in favor of chattels or real estate. Would it not thereby put impediments in the way of the federal borrowing power? There can be no doubt that a state ought not to be permitted to adopt methods of assessment which intentionally and systematically bear more heavily on franchises and stock of corporations owning federal securities than on other property. This would seem a necessary corollary from the cases holding that a state cannot discriminate against interstate commerce by selecting for taxation property or

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[73] 205 U. S. 503, 521, 27 Sup. Ct. Rep. 571 (1907).

sales of property of extra-state origin.[74] But it is of course not feasible to require a state to adopt a uniform method of assessing all the various kinds of property subject to taxation. May not the state, therefore, in exercising the discretion which must necessarily be allowed it, take heavier toll from values contributed by federal securities than from those derived from other sources?

Some methods of accomplishing such results are clearly foreclosed by congressional legislation and the decisions thereunder. When Congress on February 25, 1863, passed the first act providing for the organization of national banks,[75] it made no provision for allowing state taxation of the shares. But the National Banking Act of 1864[76] permitted such taxation, subject to two restrictions: (1) that the rate should not be greater than that "assessed upon other moneyed capital in the hands of individual citizens of such state"; and (2) that "the tax so imposed under the laws of any state upon the shares of the associations shall not exceed the rate imposed upon the shares of any of the banks organized under the authority of the state where such association is located." This second qualification was omitted from the reënactment of the statute in 1868.[77]

Under these statutes it was held in *Van Allen* v. *Assessors*[78] that the state discriminated against shares in national banks by taxing them at their full value when no tax was imposed on shares in state banks. The fact that the capital of state banks was taxed was held insufficient to overcome this inequality, since, in assessing the value of the capital, the state was required to deduct such part as was invested in United States bonds. In *People* v. *Weaver*[79] a New York statute, which permitted a debtor to deduct the

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[74] Welton *v.* Missouri, 91 U. S. 275 (1875); Darnell & Son *v.* Memphis, 208 U. S. 113, 28 Sup. Ct. Rep. 247 (1908).

[75] 12 Stat. at L. 665.

[76] 13 Stat. at L. 111.

[77] 15 Stat. at L. 34; Rev. St. § 5219 (U. S. Comp. St., 1901, 3502).

[78] 3 Wall. 573 (1866). This is the same case cited in note 58, *supra*. Of the point for which the case is here cited, the opinion said: "This is an unimportant question, as the defect may be readily remedied by the state legislature." For a different attitude towards the exemption of shares of stock where the capital of the corporation is taxed, see note 158, *infra*. Almost the entire opinion in the Van Allen Case is devoted to the question whether, in assessing the shares of national banks, there must be deduction for the federal securities owned by the bank.

[79] 100 U. S. 539 (1880).

amount of his debts from the assessment of other moneyed capital but not from shares of bank stock, was held void as to the shares of national banks. The decision cannot proceed on the ground that there was discrimination against national banks in favor of state banks, since no deduction for debts was allowed from any bank stock, state or national. The term "moneyed capital" is plainly taken in a broader sense than "capital invested in banks."

> "Nor can it be denied that, inasmuch as nearly all the banks in that State and in all others are national banks, that the owner of such shares who owes debts is subjected to a heavier tax on account of those shares than the owner of moneyed capital otherwise invested, who also is in debt, because the latter can diminish the amount of his tax by the amount of his indebtedness, while the former cannot. That this works a discrimination against the national bank shares as subjects of taxation, unfavorable to the owners of such shares, is also free from doubt. The question we are called to decide is, whether Congress in passing the Act which subjected these shares to taxation by the State, intended, by the very clause which was designed to prevent discrimination between national bank shares and other moneyed capital, to authorize such a result." [80]

In interpreting the statute, it was held that the Act of Congress has reference to the entire process of assessment and includes the valuation of the shares as well as the ratio of percentage charged on such valuation. This doctrine was applied in *Pelton* v. *Commercial Bank of Cleveland* [81] to prevent the assessment of shares in national banks at their full value when there was intentional and systematic undervaluation of all other moneyed capital. That "moneyed capital" is assumed to include other capital than that invested in banks is clear from the reference to testimony in the case to the effect that the assessors "had assessed bank shares generally higher than other personal property, including, of course, other moneyed capital; and that they had assessed the shares of the national banks higher than private banks, and that it was their aim to do so." [82] Since there were the two kinds of discrimination, the case might have been rested solely on the ground that the methods of assessment favored state banks at the expense of

[80] 100 U. S. 539, 543 (1880).

[81] 101 U. S. 143 (1880). To the same effect as Pelton *v.* Bank is Cummings *v.* Merchants' National Bank of Toledo, 101 U. S. 153 (1880), decided the same day.

[82] 101 U. S. 143, 147 (1880).

national banks. But the reason given for the decision was the discrimination in favor of "other moneyed capital," and the inference is unmistakable that some personal property other than bank shares was regarded by the court as "moneyed capital."

The statute involved in *People* v. *Weaver* [83] came before the court again in *Supervisors of Albany County* v. *Stanley* [84] and *Hills* v. *National Albany Exchange Bank*,[85] and it was held that the state must permit the deduction of debts from the assessment of shares of national banks, even though the other moneyed capital from which such deduction was allowed did not include other bank stock.[86] On the same day was decided *Evansville National Bank* v. *Britton*,[87] which arose under a statute of Indiana. Counsel for the county treasurer sought to distinguish the Indiana statute from that of New York on the ground that New York permitted deduction of debts from all personal property except bank stock, while Indiana allowed the deduction only from "credits." But the court replied that, if one of the statutes "is more directly in conflict with the Act of Congress than the other, it is the Indiana Statute." [88]

"The Act of Congress does not make the tax on personal property the measure of the tax on bank shares in the State, but the tax on moneyed capital in the hands of the individual citizens. Credits, money loaned at interest and demands against persons or corporations are more purely representative of moneyed capital than personal property, so far as they can be said to differ. Undoubtedly, there may be much personal property exempt from taxation without giving bank shares a right to similar exemption, because personal property is not necessarily moneyed capital. But the rights, credits, demands and money at interest mentioned in the Indiana Statute, from which *bonâ fide* debts may be deducted, all mean moneyed capital invested in that way." [89]

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[83] Note 79, *supra*.

[84] 105 U. S. 305 (1882).

[85] 105 U. S. 319 (1882).

[86] These cases held also that the statute under which the tax on shares in national banks was levied was not itself unconstitutional. No relief was given to complainants who had no debts to deduct. And those who had debts to deduct were not granted an abatement of the whole of the tax on their shares in national banks, but only of that part of the assessment due to the state's disallowance of deduction for their debts.

[87] 105 U. S. 322 (1882).

[88] 105 U. S. 322, 323 (1882).

[89] 105 U. S. 324 (1882).

Here is a definite statement that, though "other moneyed capital" may not include all personal property, it certainly includes other personal property than that invested in bank stocks.

The same interpretation was adopted three years later in *Boyer* v. *Boyer*,[90] in which an injunction was sought to restrain the levy of a county tax on shares of stock in a national bank. By demurrer to the bill it was confessed that a large amount of other kinds of property was exempt from county taxation. The state court had held that this was immaterial, since such exemptions did not include the shares of state banks and savings institutions. But Mr. Justice Harlan replied that this decision proceeded upon a misconstruction of the Act of Congress. He interpreted the statute as follows:

> "Capital invested in national bank shares was intended to be placed upon the same footing of substantial equality in respect of taxation by State authority, as the State establishes for other moneyed capital in the hands of individual citizens, however invested, whether in State bank shares or otherwise. As the Act of Congress does not fix a definite limit as to the percentage of value, beyond which the States may not tax national bank shares, cases will arise in which it will be difficult to determine whether the exemption of a particular part of moneyed capital in individual hands is so serious or material as to infringe the substantial rule of equality. But unless we have failed to comprehend the scope and effect of the taxing laws of Pennsylvania, the present case is not of that class." [91]

The demurrer was overruled and the defendants were put to their answer. Among the other securities exempt from county taxation were shares of stock in railroad corporations and bonds and stocks of certain other corporations which were subject to state but not to local taxation. The opinion plainly implied that the reasons of local policy for exempting these securities from local taxation were immaterial, saying that, if the principle of substantial equality between taxation of shares of national banks and taxation of other moneyed capital "operates to disturb the peculiar policy of some of the States in respect of revenue derived from taxation, the remedy therefor is with another department of the government, and does not belong to this court." [92]

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[90] 113 U. S. 689, 5 Sup. Ct. Rep. 706 (1885).

[91] 113 U. S. 689, 702, 5 Sup. Ct. Rep. 706 (1885).

[92] 113 U. S. 689, 703 (1885). In reaching the decision that Congress meant to

This decision seemed to open the door, in every case where shares in national banks were taxed, to a judicial inquiry whether the state, by exempting any other kind of moneyed capital, had imposed a substantial inequality of burden on the shares. Two years later, however, this door was practically closed by the restricted interpretation put upon "moneyed capital" in *Mercantile National Bank* v. *New York*.[93] Mr. Justice Matthews for an undivided court [94] said that no attempt was made in *Boyer* v. *Boyer* [95] to define the term or to enumerate the various kinds of property and investments that came within its description. After referring to earlier decisions [96] he declared:

"It follows, as a deduction from these decisions, that 'moneyed capital in the hands of individual citizens' does not necessarily embrace shares of stock held by them in all corporations whose capital is employed, ac-

forbid discrimination against shares of stock in national banks in favor of other property than shares of state banks, Mr. Justice Harlan calls attention to the act of 1864, which provided that the rate of tax on shares of national banks should not exceed that imposed on shares of state banks, and adds (page 691):

"But the Act of 1864 was so far modified by that of February 10, 1868, 15 Stat. at L. 34, chap. 7, that the validity of such state taxation was thereafter to be determined by the inquiry, whether it was at a greater rate than was assessed upon other moneyed capital in the hands of individual citizens, and not necessarily by a comparison with the particular rate imposed upon shares in state banks. The effect, if not the object of the latter Act was to preclude the possibility of any such interpretation of the Act of Congress as would justify States, while imposing the same taxation upon national bank shares as upon shares in state banks, from discriminating against national bank shares, in favor of moneyed capital not invested in State bank stock. At any rate, the Acts of Congress do not now permit any such discrimination."

The learned justice then quotes the prohibition against assessing shares in national banks at a greater rate than that assessed on other moneyed capital. The natural implication from the quotation given above is that the act of 1868 substituted a more comprehensive prohibition against discrimination than that contained in the act of 1864. But the clause as to discrimination in favor of "other moneyed capital" was in the act of 1864 as well as in that of 1868. The latter act omitted the clause as to rates on shares of state banks. The only legitimate inference to draw from the difference in the statutes is that the lawmakers thought that discrimination in favor of shares of state banks was amply provided for in the clause preventing discrimination in favor of other moneyed capital, and that therefore the specific clause in the earlier statute was superfluous. The change in the statute throws no additional light on what was meant by "other moneyed capital."

[93] 121 U. S. 138, 7 Sup. Ct. Rep. 826 (1887).

[94] Mr. Justice Blatchford not sitting.

[95] Note 90, *supra*.

[96] People *v.* Commissioners, 4 Wall. 244 (1867); Lionberger *v.* Rouse, 9 Wall. 468 (1870); Hepburn *v.* School Directors, 23 Wall. 480 (1875); Adams *v.* Nashville, 95 U. S. 19 (1877).

cording to their respective corporate powers and privileges, in business, carried on for the pecuniary profit of shareholders, although shares in some corporations, according to the nature of their business, may be such moneyed capital." [97]

The true test, he says, "can only be found in the nature of the business in which the corporation is engaged." [98] And it is declared that by "other moneyed capital" Congress must have meant capital invested in some business that competes with the national banks.

"The main purpose, therefore, of Congress, in fixing limits to State taxation on investments in the shares of national banks, was to render it impossible for the State, in levying such a tax, to create and foster an unequal and unfriendly competition, by favoring institutions or individuals carrying on a similar business and operations and investments of a like character. The language of the Act of Congress is to be read in the light of this policy." [99]

The learned justice refers to railroad, mining and manufacturing companies and makes the point that the property of such corporations consists of real and personal property which, in the hands of individuals, no one would think of calling "moneyed capital." And from this he concludes:

"So far as the policy of the government in reference to national banks is concerned, it is indifferent how the States may choose to tax such corporations as those just mentioned, or the interest of individuals in them, or whether they should be taxed at all. Whether property interests in railroads, in manufacturing enterprises, in mining investments, and others of that description, are taxed or exempt from taxation, in the contemplation of the law, would have no effect upon the success of national banks. There is no reason, therefore, to suppose that Congress

[97] 121 U. S. 138, 153, 7 Sup. Ct. Rep. 826 (1887).

[98] 121 U. S. 138, 154, 7 Sup. Ct. Rep. 826 (1887).

[99] 121 U. S. 138, 155 (1887). A little later, the opinion says: "But 'moneyed capital' does not mean all capital the value of which is expressed in terms of money. . . . Neither does it necessarily include all forms of investment in which the interest of the owner is expressed in money" (page 155). After describing the business of banking, Mr. Justice Matthews observes: "These are the operations in which the capital invested in national banks is employed, and it is the nature of that employment which constitutes it in the eye of the statute 'moneyed capital.' Corporations and individuals carrying on these operations do come into competition with the business of national banks, and capital in the hands of individuals thus employed is what is intended to be described by the Act of Congress" (page 156).

intended, in respect to these matters, to interfere with the power and policy of the States." [100]

It was held therefore that, however large may be "the amount of moneyed capital in the hands of individuals, in the shape of deposits in savings banks as now organized, which the policy of the State exempts from taxation for its own purposes, that exemption cannot affect the rule for the taxation of shares in national banks. . . ." [101]

This restricted interpretation of "other moneyed capital" is directly at variance with that adopted in *Boyer* v. *Boyer* [102] and in the cases on the New York and Indiana statutes.[103] Though these latter cases are cited in the Mercantile Bank opinion for the proposition that the Act of Congress could not be evaded by unequal assessments on shares in national banks and other moneyed capital, no notice is taken of the significant fact that the "other moneyed capital" with which comparison was made was exclusive

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[100] 121 U. S. 138, 156, 7 Sup. Ct. Rep. 826 (1887).

[101] 121 U. S. 138, 161 (1887). Earlier in the opinion, pages 160–61, Mr. Justice Matthews said: "It cannot be denied that these deposits constitute moneyed capital in the hands of individuals within the terms of any definition which can be given to that phrase; but we are equally certain that they are not within the meaning of the Act of Congress in such a sense as to require that, if they are exempted from taxation, shares of stock in national banks must thereby also be exempted from taxation. No one can suppose for a moment that savings banks come into any possible competition with national banks of the United States." Then after quoting from Hepburn *v.* School Directors, note 110, *infra*, to the effect that "it could not have been the intent of Congress to exempt bank shares from taxation because some moneyed capital was exempt," the learned justice added: "The only limitation, upon deliberate reflection, we now think it necessary to add, is that these exemptions should be founded upon just reason, and not operate as an unfriendly discrimination against investments in national bank shares." This tempts one to ask: "When is other moneyed capital not other moneyed capital?" The answer seems to be: "When the discrimination in its favor is not unfriendly." The opinion seems to proceed along diverse and somewhat inconsistent lines of reasoning. It seems to declare that all exemptions of capital that do not compete with national banks are immaterial, since such capital is not "other moneyed capital" within the meaning of Congress. Yet it is implied that exemptions of capital which is not "moneyed capital" as thus defined may violate the congressional statute if they are unfriendly to national banks and not founded upon just reason. Deposits in savings banks are said to be "moneyed capital in the hands of individuals within the terms of any definition which can be given to that phrase," and yet their exemption is immaterial because savings banks do not compete with national banks. For suggestions of a different ground on which to sustain the case and those following it, see pp. 366, 367, *infra*.

[102] Note 90, *supra*.

[103] Notes 83–87, *supra*.

of capital invested in institutions which compete with national banks. And though the Boyer Case did not, it is true, enumerate the various kinds of property that come within the description of "other moneyed capital," it held explicitly that the term embraced other property than shares of state banks and savings institutions. Nor is the decision in the Mercantile Bank Case in any way justified by the precedents cited for the proposition that "other moneyed capital" does not necessarily embrace stock in all corporations whose capital is employed in business for pecuniary profit.

The first of these cases is *People ex rel. Duer* v. *Commissioners of Taxes*,[104] decided the next term after *Van Allen* v. *Assessors*.[105] In the Duer Case an owner of national bank stock complained of discrimination because he was allowed no deduction for the value of United States bonds owned by the bank, while individuals and corporations who were taxed on their property could deduct such federal securities as they owned. The complaint was rejected on the grounds (1) that the congressional statute applies only to the rate of assessment, and (2) that it has no reference to moneyed capital in the hands of corporations but only to that in the hands of individual citizens. This first ground was overruled in *People* v. *Weaver*,[106] decided fourteen years later. The second ground was not applicable to the Mercantile Bank Case, because the exemptions there objected to included shares of stock and other capital in the hands of individuals. The Van Allen Case of course established that an owner of stock in a national bank must pay taxes on the value contributed by the federal securities owned by the bank, although an owner of the securities does not. No exemptions are allowed to owners of stock in corporations holding such bonds. The opinion in the Duer Case points out that Congress, when it permitted the taxation of shares in national banks but forbade discrimination against them, was well aware that federal securities were exempt from direct taxation. The argument of the complainant, says Mr. Justice Nelson, proves either that Congress meant that federal securities should be subject to taxation in the hands of their owners, or else that the deduction of such securities from taxes on property "should operate as a violation of the rate of the tax prescribed" in the statute permitting taxation of national

[104] 4 Wall. 244 (1867). [105] Note 58, *supra*. [106] Note 79, *supra*.

bank shares. "We dissent," he says, "from both conclusions." [107] The point of the Duer Case is that exemption of federal securities from direct taxation does not make a tax on the full value of national bank shares violate the requirement that such taxation shall not be "at a greater rate than is assessed on other moneyed capital." This is but to say that, if the banks as federal instrumentalities are not embarrassed by taxation of the full value of their shares, the situation is not changed because another federal instrumentality — *i. e.*, United States bonds — escapes direct taxation. It is not to say that Congress, because it meant to exclude United States bonds from the "other moneyed capital" which the State must tax at the same rate as shares in national banks, meant also to exclude shares in all corporations which did not compete with national banks. Moreover, though United States bonds escape direct taxation, they may be included in the measure adopted for assessing franchises and shares of corporations. This was declared in the opinion in the Duer Case in dealing with *Mead* v. *Commissioners*,[108] in which an owner of state bank stock was denied deduction for the value of federal securities owned by the bank. Had such deduction been granted to owners of stock in state banks and other corporations, and denied to owners of national bank stock, there would be a discrimination analogous to that held invalid in *People* v. *Weaver*.[109]

Another case cited in the Mercantile Bank opinion is *Hepburn* v. *School Directors*.[110] This held that it was not a discrimination against shares in national banks to assess them at their market value, although money at interest was assessed at its par value, since what is taxed in the case of the share is not money at interest, but the stockholder's interest in the money of the bank, which may

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[107] 4 Wall. 244, 257 (1867).

[108] 4 Wall. 244, 258 (1867). No separate opinion was rendered in this case, or in ten other cases decided at the same time as the Duer Case and disposed of in the opinion in that case. The majority said that the general question involved in Mead *v.* Commissioners "was distinctly presented in the bank cases of the last term of which Van Allen *v.* Assessors was one of the class, and disposed of." This neglects the fact that the opinion in the Van Allen Case went on the ground that Congress granted to the states express permission, not only to tax the shares of national banks, but to assess them at their full value, including that contributed by federal securities owned by the bank. See p. 339, *supra*.

[109] Note 79, *supra*.

[110] 23 Wall. 480 (1875).

be greater or less than the sums put in by the stockholders. The Hepburn case held also that exemption of mortgages, moneys owing on agreements for the sale of real estate, etc., from local taxation did not operate to discriminate against shares in national banks, since such exemption was partial only and was "evidently intended to prevent a double burden by the taxation both of property and the debts secured upon it." [111] The economic value behind those debts was taxed, and to tax both the debts and the property on which they were secured would impose double the burden that is placed on the shares of national banks or the elements of value behind them. The Hepburn opinion, it is true, observed that "it could not have been the intention of Congress to exempt bank shares from taxation, because some moneyed capital was exempt." [112] But this is only to say that some exemptions do not prevent the "substantial equality" required by the statute. The statement quoted above must be taken in connection with the remark in an earlier part of the opinion to the effect that "money at interest" is not the only moneyed capital included in the term as used by Congress. "The words are 'other moneyed capital.' That certainly makes stock in these banks moneyed capital, and would seem to indicate that other investments in stock and securities might be included in that descriptive term." [113]

Lionberger v. *Rouse*,[114] which is also cited in the Mercantile Bank opinion, arose under the provision in the Act of 1864 that the rate on shares of national banks should not exceed that imposed on shares of state banks. There were two state banks in Missouri which, by contract contained in their charter, could be taxed only one per cent on their capital stock. This was less than the rate imposed on shares of national banks. The Supreme Court recognized that the discrimination came within the letter of the congressional prohibition, but insisted that it was not within its spirit, because Congress could not have intended "such an absurd thing as that the power of the State to tax should depend on its doing an act which it had bound itself not to do." [115] Reference was also made to the fact that these two banks "hold a very inconsiderable portion of the banking capital of the State, and that the shares of

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[111] 23 Wall. 480, 485 (1875).
[112] *Ibid.*
[113] 23 Wall. 480, 484 (1875).
[114] 9 Wall. 468 (1870).
[115] 9 Wall. 468, 475 (1870).

all other associations in the State (there being many), with all the privileges of banking except the power to emit bills, are taxed like the shares in national banks." [116] The case evidently depends on its own special facts. The court declares also that the provision in the Act of 1864 under which the case arose refers only to banks of issue and not to banks of deposit. Since this portion of the statute was soon repealed, and since the continuing provision as to "other moneyed capital" is held to include shares of stock in other state banks than banks of issue, this point in the decision, whether sound or questionable, is unimportant. The opinion in the Mercantile Bank Case is therefore unwarranted in relying on the quotation from the Lionberger Case to the effect that "there was nothing to fear from banks of discount and deposit merely, for in no event could they work any displacement of national bank circulation." [117]

The other case cited in the Mercantile Bank opinion is *Adams* v. *Nashville*,[118] from which the following quotation is made:

> "The Act of Congress was not intended to curtail the State power on the subject of taxation. It simply required that capital invested in national banks should not be taxed at a greater rate than like property similarly invested. It was not intended to cut off the power to exempt particular kinds of property, if the Legislature chose to do so. Homesteads to a specified value, a certain amount of household furniture (the six plates, six knives and forks; six teacups and saucers of the old statutes), the property of clergymen to some extent, school houses, academies and libraries are generally exempt from taxation. The discretionary power of the Legislatures of the States over all these subjects remains as it was before the Act of Congress of June, 1864. The plain intention of that statute was to protect the corporations formed under its authority from unfriendly discrimination by the States in the exercise of their taxing power." [119]

But this statement was not at all necessary to the decision in the Adams Case. The two objections there made were to the exemption of capital in state banks and of bonds of municipal corporations. As to the former the court said that the exemption of the capital stock was immaterial since the shares of stock were taxed to their owners. And as to the latter, it was said that it did not

[116] 9 Wall. 468, 474 (1870).
[117] *Ibid.* Quoted in 121 U. S. 138, 150 (1887).
[118] 95 U. S. 19 (1877).
[119] 95 U. S. 19, 22 (1877). Quoted in 121 U. S. 138, 151 (1887).

appear that the municipal bonds were in fact exempt. There was therefore no occasion for Mr. Justice Hunt to say in the opinion in the Adams Case that the Act of Congress was not intended to curtail the state power on the subject of taxation. Of course the Act did not mean to prevent a state from doing as it pleased with regard to subjects over which it has complete control. But plainly it meant to qualify the permission to tax shares of national banks, by the requirement that they should not be assessed at a greater rate than other moneyed capital. Therefore the action of the state with respect to matters within its control was made the test of the propriety of action with respect to matters without its control, except to the extent permitted by Congress. The general statement quoted from the Adams opinion is opposed to the statements in the Boyer opinion eight years later. The Mercantile Bank Case, in declaring that "other moneyed capital" meant only capital which competes with national banks, made new law.

The decisions of the Supreme Court following the Mercantile Bank Case have not uniformly rested on the ground of this restricted interpretation of moneyed capital. In *Whitbeck* v. *Mercantile National Bank*,[120] where all bank stocks were assessed at sixty-five per cent of their full value and other property at sixty per cent, the Supreme Court said that "the discrimination against national banks, as compared with other moneyed capital is established," and sustained an injunction against collecting the full amount of the tax on the shares of national banks.[121] The court also held that the bank was entitled to relief in respect to the tax on certain stock whose owners had not been allowed to deduct their indebtedness from the assessment. The objection that the demand for the deduction was not seasonably made is dismissed on the ground that "the laws of Ohio make no provision for the deduction of the *bonâ fide* indebtedness of any shareholder from the shares of

[120] 127 U. S. 193, 8 Sup. Ct. Rep. 1121 (1888).

[121] Another ground for the decision is that it appeared that the State Board of Equalization had no power under the Ohio statute to equalize assessments of bank stocks with those of other property, but only to "diminish or increase the assessed value of the shares of stock by such a per centum as will make them equal among themselves." While this unwarranted action by the state board would be a sufficient ground for declaring invalid the tax on the shares in national banks, it would not necessarily involve a federal question. The opinion indicates that the decision would not have been different had the state statute authorized the action of the state board.

his stock, and provide no means by which said deduction can be secured." [122] This language clearly implies that no deduction of debts was allowed from the assessment of any bank stocks, state or national. But in *First National Bank of Wellington* v. *Chapman*[123] the Whitbeck Case was distinguished on the ground that the court had "assumed that under the statute of Ohio, owners of all moneyed capital other than shares of national banks were permitted to deduct" their indebtedness.[124] And the opinion in the Chapman Case declares explicitly that so long as shares in state and national banks are taxed alike, deduction of debts from assessment of "credits" that do not enter into competition with national banks is immaterial.

Three years earlier, however, the opinion in *First National Bank of Garnett* v. *Ayers* [125] had failed to take the broad ground that stock in institutions that compete with national banks is all that is embraced within the term "moneyed capital." This case, too, involved a statute permitting deduction of debts from assessment of "credits" but not from assessment of any bank stock. The reason given for the decision was that it did not appear how extensive were the deductions allowed for debts in assessing other property. The court said that to come to a decision in favor of the plaintiff in error it would be necessary to take judicial notice of the fact claimed by counsel "that the amount of moneyed capital in the state of

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[122] 127 U. S. 193, 199, 8 Sup. Ct. Rep. 1121 (1888).

[123] 173 U. S. 205, 19 Sup. Ct. Rep. 407 (1899).

[124] 173 U. S. 205, 220 (1899). It is almost certain that no such assumption was made in the Whitbeck Case. The opinion in that case speaks of "shareholder" and "shares of stock" without any qualifying terms. Moreover, the other discriminations in the case were plainly between all bank stocks on the one hand and other property on the other. From section 2762 of the Revised Statutes of Ohio in force on January 1, 1886, it appears that shares of stock "in any incorporated bank or banking association . . . whether now or hereafter incorporated or organized under the laws of this state or of the United States" are treated alike. No deduction for debts seems to be allowed from any property subject to taxation except in the case of what is termed "credits." Provision for such deduction is made in section 2730 in which it is said that "the term 'credits' shall be held to mean the excess of the sum of all legal claims and demands . . . over and above the sum of legal *bonâ fide* debts owing by such person." It is worthy of note too that the complainant in the Whitbeck Case was excused for not having requested the deduction of his debts on the authority of Hills *v.* National Albany Exchange Bank, note 85, *supra*, in which there was no discrimination between national and state banks as to deduction of indebtedness from assessments of their shares.

[125] 160 U. S. 660, 16 Sup. Ct. Rep. 412 (1896).

Kansas from which debts may be deducted, as compared with the moneyed capital invested in national banks, was so large and substantial as to amount to an illegal discrimination against national bank shareholders." [126] This the court declined to do. It said that "the single fact that the statute of Kansas permits some debts to be deducted from some moneyed capital, but not from what is invested in the shares of national banks, is not sufficient. . . ." [127] The "moneyed capital" which the court had in mind must have been other property than shares in state and national banks.

So also, in the most recent case on the subject, the court does not base its decision on the ground that no property that does not compete with national banks is "moneyed capital." This is *Amoskeag Savings Bank*,[128] in which a New Hampshire bank, owning stock in a New York national bank objected to the New York assessment of its shares because it was not allowed to deduct from the assessment an amount equal to its debts, which were in fact greater than the value of its stock. From all property except stock in state and national banks such deduction was allowed. The complainant relied on *People* v. *Weaver*.[129] Mr. Justice Pitney distinguished the case on the ground that the New York statute there involved taxed bank stock in the same manner as all other property, while the later New York statute involved in the Amoskeag Case had a different method of assessing bank stock from all other property. By that statute shares of stock in state and national banks were taxed at one per cent except in towns where the local rate was less. All other property was subject to varying local rates of assessment, which were usually higher than one per cent. The learned justice quotes at length from the opinion in the Mercantile Bank Case, but makes no further comment thereon than that "the rule of construction thus laid down has since been consistently adhered to by this court." [130] He fails to state that the Mercantile Bank Case overrules the Weaver Case to the extent of holding that no comparison may be made between the assessment of bank shares and of other property that does not

[126] 160 U. S. 660, 667, 16 Sup. Ct. Rep. 412 (1896).
[127] 160 U. S. 660, 667–68, 16 Sup. Ct. Rep. 412 (1896).
[128] 231 U. S. 373, 34 Sup. Ct. Rep. 114 (1913).
[129] Note 79, *supra*.
[130] 231 U. S. 373, 391, 34 Sup. Ct. Rep. 114 (1913).

compete with bank shares. The important part of the opinion is as follows:

> "Nor can we say that the taxing scheme contravenes the limits prescribed by Sec. 5219, Rev. Stat. merely because in individual cases it may result that an owner of shares of national bank stock, who is indebted, may sustain a heavier tax than another, likewise indebted, who has invested his money otherwise." [131]

The vice in the contention to the contrary was said to be that it insists that "Sec. 5219 deals with the burden of the tax on the individual shareholder, rather than upon shareholders as a class." [132] The opinion points out that, since bank stocks are assessed at a lower rate than other property, the deduction of debts from such other property is not likely to make the assessment of that other property discriminate against bank stocks, and says that, if the contrary is true in general, the complainant must allege and prove it.[133] Thus it seems that the court thought that intentional and general discrimination against stocks of national banks and other banks in favor of property not competing with national banks would come within the limitations of the federal statute. Nevertheless in this and the other cases on the subject the Mercantile Bank Case is quoted with approval. But at the same time a number of the opinions seem to treat the rule of the Mercantile Bank Case with respect to the definition of "other moneyed capital" as a rule *nisi* and not a rule absolute.

But in dealing with exemptions of other property from taxation

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[131] 231 U. S. 373, 393, 34 Sup. Ct. Rep. 114 (1913).

[132] *Ibid.*

[133] "There are other considerations to be weighed in determining the actual burden of the tax, one of which is the mode of valuing bank shares — by adopting 'book values' — which may be more or less favorable than the method adopted in valuing other kinds of personal property. As against the owner of bank shares who, by alleging discrimination, assumes the burden of proving it, and who fails to show that the method of valuation is unfavorable to him, it may be assumed to be advantageous." 231 U. S. 373, 392–93 (1913). And in considering the contention of the complainant that the statement of the New York court that "when all things are considered, the rate, even without the privilege of deducting debts, is not greater than that applied to other moneyed capital" is a mere surmise, Mr. Justice Pitney says: "We do not think it is to be so lightly treated; but, if it were, it still remains to be said that it was incumbent upon plaintiff in error to show affirmatively that the New York taxing system discriminates in fact against holders of shares in the national banks, before calling upon the courts to overthrow it; and no such showing has been made" (page 393).

reliance has usually been placed on the restricted definition of "other moneyed capital." [134] In *Bank of Redemption* v. *Boston*,[135] an alleged discrimination against shares in national banks in favor of shares in trust companies, insurance companies and in a telephone company was held immaterial, since "the interest of individuals in these institutions is not moneyed capital" and "the investments made by the institutions themselves, constituting their assets, are not moneyed capital in the hands of individual citizens of the State." [136] In *First National Bank of Aberdeen* v. *County of Chehalis*,[137] it was alleged in the bill that there was exempt in the county loans and securities due from residents to residents, to an amount in excess of $237,400, and in the state outside of the county over $14,000,000 of loans and securities due from residents to residents, and at least $26,000,000 of stocks and bonds of insurance, wharf and gas companies, while the total capitalization of all national banks in the state was only $7,000,000. A demurrer to the bill was sustained for the reason that, under the prior decisions of the court, since the capital exempted did not come into competition with national banks, it is not within the meaning of "other moneyed capital" as that term was used by Congress.[138] But Justices Harlan, Brown and White dissented, being of opinion that "the bill makes a *prima facie* case of illegal discrimination against capital invested in national bank stock." [139] The majority seemed to

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[134] In addition to the cases here considered, see Newark Banking Co. *v.* Newark, 121 U. S. 163, 7 Sup. Ct. Rep. 839 (1887); Palmer *v.* McMahon, 133 U. S. 660, 10 Sup. Ct. Rep. 324 (1890); and Talbott *v.* Silver Bow County Commissioners, 139 U. S. 438, 11 Sup. Ct. Rep. 594 (1891).

[135] 125 U. S. 60, 8 Sup. Ct. Rep. 772 (1888). This case held also that a state could tax the shares of a national bank even when owned by other national banks.

[136] 125 U. S. 60, 68, 8 Sup. Ct. Rep. 772 (1888).

[137] 166 U. S. 440, 17 Sup. Ct. Rep. 629 (1897).

[138] "The conclusions to be deduced from these decisions are that money invested in corporations or in individual enterprises that carry on the business of railroads, of manufacturing enterprises, mining investments, and investments in mortgages does not come into competition with the business of national banks, and is not therefore within the meaning of the act of Congress; that such stocks as those in insurance companies may be legitimately taxed on income instead of on value, because such companies are not competitors for business with national banks; and that exemptions, however large, of deposits in savings banks, or of moneys belonging to charitable institutions, if exempted for reasons of public policy and not as an unfriendly discrimination against investments in national bank shares, should not be regarded as forbidden by U. S. Rev. Stat. § 5219." 166 U. S. 440, 460–61 (1897).

[139] 166 U. S. 440, 462, 17 Sup. Ct. Rep. 629 (1897).

think that possibly some of the loans and securities held by citizens of the country might be "moneyed capital," but nevertheless sustained the demurrer on the ground that "as against the pleader, we may well assume that they belong to a class of investments which does not compete with the business of national banks." [140]

Though somewhat varying reasons have been given for the decisions subsequent to the Mercantile Bank Case, the Whitbeck Case is the only one in which the Supreme Court has invalidated a tax on shares of national banks where the discrimination in favor of other moneyed capital was not in favor of shares in state banks. In only two other cases has the charge of discrimination been sustained. In *San Francisco National Bank* v. *Dodge*[141] the majority of the court found that, while the assessment of shares of stock in national banks included the elements of value contributed by "good-will, dividend earning power, the ability with which the corporate affairs were managed, the confidence reposed in the capacity and permanence of tenure of the officers, and all those other indirect and intangible elements of value which enter into the estimate of the worth of the stock, and help to fix the market value or selling price of the shares," [142] the taxation of state banks on their property only, with exemption of their shares, did not take account of these intangible elements of value. A bill to restrain the enforcement of taxes on the shares of the national banks was therefore sustained.

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[140] 166 U. S. 440, 461, 17 Sup. Ct. Rep. 629 (1897). This assumption as to the loans and securities and possibly also the decision as to stocks of insurance companies seem to be inconsistent with the statement in the Mercantile Bank Case as to what was included in the term "moneyed capital." In the opinion in that case in 121 U. S. 138, 157, Mr. Justice Matthews says: "The terms of the Act of Congress, therefore, include shares of stock or other interests owned by individuals in all enterprises in which the capital employed in carrying on its business is money, where the object of the business is the making of profit by its use as money. The moneyed capital thus employed is invested for that purpose in securities by way of loan, discount, or otherwise, which are from time to time, according to the rules of the business, reduced again to money and reinvested. It includes money in the hands of individuals employed in a similar way, invested in loans, or in securities for the payment of money, either as an investment of a permanent character, or temporarily with a view to sale or repayment and reinvestment. In this way the moneyed capital in the hands of individuals is distinguished from what is known generally as personal property." In deciding what property comes into competition with national banks, some of the later cases have given in effect an even more restricted interpretation of "other moneyed capital" than was put forward in the Mercantile Bank Case. See p. 363, *infra*.

[141] 197 U. S. 70, 25 Sup. Ct. Rep. 384 (1905).

[142] 197 U. S. 70, 80, 25 Sup. Ct. Rep. 384 (1905).

The minority, consisting of Mr. Justice Brewer, who wrote the dissenting opinion, Chief Justice Fuller and Justices Brown and Peckham, differed from their brethren with respect to the values reached by the method of assessing state banks, and with respect to the propriety of equitable relief. In *Covington* v. *First National Bank*,[143] a retroactive provision in a Kentucky statute, relating solely to shares of stock in national banks, by which such banks were charged with liability for taxes for past years, was also held an invalid discrimination against shares of national banks. These two discriminations related to liability to taxation and to methods of valuation.

With respect to variations in the methods of assessing shares in national banks and other property that admittedly comes into competition with national banks, the court has required complainants to show that the variation in methods actually operates to discriminate. In *Davenport National Bank* v. *Board of Equalization* [144] the proposition of counsel that savings banks and national banks must be taxed in the same way was explicitly negatived. "The Act of Congress does not require a perfect equality of taxation between state and national banks, but only that the shares of national banks shall not be taxed at a higher rate than other moneyed capital in the hands of individuals." [145] In *First National Bank of Wellington* v. *Chapman*[146] complaint was made of discrimination in favor of unincorporated bankers, because they were allowed to deduct their debts, while owners of national bank shares were not. But the court found that the only debts so deducted were those incurred in the banking business, and that the deduction of such debts was necessary to determine the real value of the capital employed by the unincorporated banker. The provision that the shares of national banks should be listed at their true value in money was held to require the deduction of the liabilities of a national bank from its resources in the assessment of its shares, so that there was no discrimination in favor of the unincorporated banker.

"That mathematical equality is not arrived at in the process is immaterial. It cannot be reached in any system of taxation, and it is useless

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[143] 198 U. S. 100, 25 Sup. Ct. Rep. 562 (1905).
[144] 123 U. S. 83, 8 Sup. Ct. Rep. 73 (1887).
[145] 123 U. S. 83, 85, 8 Sup. Ct. Rep. 73 (1887).
[146] 173 U. S. 205, 19 Sup. Ct. Rep. 407 (1899).

and idle to attempt it. Equality, so far as the differing facts will permit, and as near as they will permit, is all that can be aimed at or reached. That measure of equality we think is reached under this system."[147]

The fact that unincorporated bankers were not assessed for franchise value while shares of national banks included such value was held to be immaterial, since such value existed in the case of national banks and did not exist in the case of unincorporated bankers. And in *Amoskeag Savings Bank*,[148] in dealing with deductions for debts, Mr. Justice Pitney said of the federal statute:

"The language clearly prohibits discrimination against shareholders in national banks, and in favor of shareholders in competing institutions, but it does not require that the scheme of taxation shall be so arranged that the burden shall fall upon each and every shareholder alike, without distinction arising from circumstances personal to the individual."[149]

The opinion in the Amoskeag Case says also that "the holders of shares in state banks are subjected to precisely the same taxation, and with respect to other competitive institutions, such as trust companies, the franchise taxes imposed upon them apparently result in a substantially similar burden upon the shareholder."[150] Thus trust companies are assumed to be institutions which compete with national banks. In *Jenkins* v. *Neff*,[151] however, decided eleven years earlier, the Supreme Court dismissed an alleged discrimination in favor of trust companies on the ground that, since the New York statute did not give to New York trust companies "power to loan, discount or purchase paper," they were not in competition with national banks.[152] It was suggested by complainant that in fact they exercised those powers. But the court answered that it would assume that the state would take proper steps to keep the trust companies within their proper limits, and that a neglect for a limited time cannot be deemed an assent by the state to an improper assumption of power. The opinion in the Supreme Court did not state the discriminations

[147] 173 U. S. 205, 216, 19 Sup. Ct. Rep. 407 (1899).

[148] Note 128, *supra*.

[149] 231 U. S. 373, 393–94, 34 Sup. Ct. Rep. 114 (1913).

[150] 231 U. S. 373, 391–93, 34 Sup. Ct. Rep. 114 (1913).

[151] 186 U. S. 230, 22 Sup. Ct. Rep. 905 (1902).

[152] This view of trust companies was also taken in Bank of Redemption *v.* Boston, note 135, *supra*. The statement in that case had reference to exemption of the shares of stock in trust companies as well as of their capital.

alleged, but from the opinions in the same case in the Appellate Division and Court of Appeals of New York [153] it appears that objection was made to the fact that trust companies were allowed to deduct from the assessment of their capital an amount equivalent to their investment in non-taxable securities, while owners of stock in national banks had no corresponding privilege. Such a contention of course denies the validity of the distinction between taxes on shares and taxes on capital, which was asserted in the Van Allen Case [154] and has been consistently followed.[155] The contention also denies the position that taxes on the capital of corporations are not taxes on moneyed capital in the hands of individual citizens.[156] So there were two established grounds upon which to reach the decision in *Jenkins* v. *Neff* without declaring in effect that no discrimination whatever in favor of trust companies would be within the limitation in the congressional permission to tax shares of national banks. But this seems to be the doctrine of the case in both the Supreme Court and the state courts. The opinion in the New York Court of Appeals relied on a quotation from the opinion in the Mercantile Bank Case to the effect that "it is evident, from this enumeration of powers [conferred by the New York statute] that trust companies are not banks in the commercial sense of that word, and do not perform the functions of banks in carrying on the exchanges of commerce." [157] But that declaration in the Mercantile Bank opinion is followed by the statement that the trust companies deal in money and securities "in such a way as properly to bring the shares of stock held by individuals therein within the definition of moneyed capital in the hands of individuals, as used in the Act of Congress." [158]

[153] Jenkins *v.* Neff, 62 N. Y. Supp. (96 N. Y. St. Rep.) 321 (1900); *id.*, 163 N. Y. 320 (1900).

[154] Note 58, *supra.*

[155] See cases cited in notes 62 and 108, *supra.*

[156] See cases cited in notes 104 and 135, *supra.*

[157] 121 U. S. 138, 159, 7 Sup. Ct. Rep. 826 (1887). Quoted in 163 N. Y. 320, 329.

[158] 121 U. S. 138, 159 (1887). In applying this to the facts in the Mercantile Bank Case the court said: "But we fail to find in the record any sufficient ground to believe that the rate of taxation, which in fact falls upon this form of investment of moneyed capital, is less than that imposed upon the shares of stock in national banks." The reason given was that the capital of trust companies is required to be assessed at its actual value which "is ascertained by reference, among other standards, to the market price of its shares, so that the aggregate value of the entire capital may be the market price of one multiplied by the whole number of shares." It is recognized, however,

It is apparent from the foregoing review that the Supreme Court has not been uniformly satisfied to rest its decisions upon a legal definition of the term "other moneyed capital" as used by Congress. The unusual definition evolved in the Mercantile Bank Case was evidently the product of economic considerations. It was due to a desire to exclude formal legal discriminations which did not in fact operate to the disadvantage of national banks as instrumentalities of the national government. The normal meaning of "other moneyed capital" was disregarded in favor of an artificial meaning that took into account economic considerations which the court thought must have been in the mind of Congress. Yet in applying this restricted definition of "other moneyed capital," the opinion in the Mercantile Bank Case was not wholly consistent with itself. For it calls municipal bonds and deposits in savings banks "moneyed capital,"[159] and still dismisses their exemption as immaterial. The court then, as later, labored under difficulties in relying exclusively and consistently on its legal definition of "other moneyed capital."

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that "from this are to be deducted, of course, the real estate of the corporation, otherwise taxed, and the value of such part of the capital stock as is invested in non-taxable property, such as securities of the United States." Such deductions from taxation of capital stock of state banks was held in Van Allen *v.* Assessors, note 78, *supra,* to render the tax on the capital of the state banks not equivalent to the tax on the shares of national banks. The opinion in the Mercantile Bank Case on the point under consideration does not refer to the Van Allen Case, or answer the objection there sustained, except by indirection. It states as a fact that, in addition to the tax on the capital of a trust company, the corporation pays to the state "as a state tax, a tax upon its franchise based upon its income; the tax on the capital being for local purposes." Whether this resulted in imposing on trust companies taxes equivalent to those on shares of stock in national banks would of course depend upon whether the actual amount of the tax on the franchise was equivalent to the deduction from the tax on the capital by reason of the holdings of United States bonds.

[159] "Bonds issued by the State of New York, or under its authority by its public municipal bodies . . . are not taxable even by the United States. . . . Such securities undoubtedly represent moneyed capital, but as from their nature they are not ordinarily the subjects of taxation, they are not within the reason of the rule established by Congress for the taxation of national bank shares." 121 U. S. 138, 162, 7 Sup. Ct. Rep. 826 (1887).

"However large, therefore, may be the amount of moneyed capital in the hands of individuals, in the shape of deposits in savings banks as now organized, which the policy of the State exempts from taxation for its own purposes, that exemption cannot affect the rule for the taxation of shares in national banks, provided they are taxed at a rate not greater than other moneyed capital in the hands of individuals otherwise subject to taxation." 231 U. S. 157, 161, 34 Sup. Ct. Rep. 46 (1913). See also note 101, *supra.*

Perhaps a more acceptable ground for decisions involving exemptions, deductions of debts, and variations in methods of assessment other than in rates of levy would be that such alleged discriminations are not within the letter of the prohibition against taxing national bank shares "at a greater rate" than other moneyed capital, and that whether such alleged discriminations come within the spirit of the statute must depend on whether their effect is to impose a substantial discrimination against money invested in national banks. Common-sense would then require the court to hold that the exemption of any particular legal *res* was unimportant so long as there was taxation of the economic value behind that *res*. Exemption of shares of stock is therefore unimportant when there is taxation of the franchise and capital of the corporation.[160] Exemption of the franchise and capital is unimportant where there is taxation of the shares.[161] Exemption of mortgages or money due for the sale of real estate is unimportant, so long as the real estate or other property mortgaged is taxed.[162] Exemption of federal securities could be disregarded because the federal government would suffer less from the taxation of only one of its instrumentalities than from the taxation of two.[163] Exemption of state and municipal securities could be disregarded, because the exemption affects the rate at which the state may borrow.[164] If the securities were taxable they would bear a correspondingly higher rate of interest and the net result to the individuals and to the state would be substantially similar to the effect of their exemption. Exemption of deposits could be disregarded because the banks are taxed on the investments made with those deposits.[165] And such other exemptions or variations in methods of assessment as might appear in the taxing laws of any state could doubtless be excused on the ground that they were so slight as not to interfere with the substantial equality between assessment of shares in national banks and that of other moneyed capital.[166] The only burden that can be imposed on national banks is through taxation

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[160] Amoskeag Savings Bank, note 150, *supra*.

[161] Adams *v.* Nashville, note 118, *supra*.

[162] Hepburn *v.* School Directors, note 111, *supra*.

[163] People *ex rel.* Duer *v.* Commissioners of Taxes, note 104, *supra*.

[164] Mercantile National Bank *v.* New York, note 159, *supra*.

[165] *Ibid.*, note 93, *supra*.

[166] See cases cited in notes 111, 114, 125 and 128, *supra*.

of their real estate and their shares of stock. So long as substantially equivalent burdens are imposed on all other economic values by taxation of tangible property and of the capital and franchises of corporations, it would be absurd to insist that the exemption of one or more of the legal forms of property in which those values may be represented, results in taxing shares in national banks at a greater rate than that imposed on other moneyed capital. The rule of the Mercantile Bank Case practically comes down to a disregard of formal legal discrimination where there is in fact no substantial economic discrimination.

The cases on the subject under discussion prevent a state from imposing heavier burdens on shares in national banks than on shares in state banks. But the attempts of the state are frustrated, not because they would hamper the power of the national government to borrow money, but because, by encouraging capital to invest in state banks rather than in national banks, they would interfere with the latter as instrumentalities of the national government. And the only question which has been considered was whether the discriminations alleged came within the prohibition of Congress. The point that, owing to the large holdings of United States bonds in the vaults of the national banks, the state may by indirection impose heavier burdens on investments in federal securities than on other forms of property is not discussed.[167] This point raises a problem which arises independently of the question whether any method of taxation interferes with the banks as instrumentalities of government. And the solution must be sought, not in the language of a congressional enactment,

[167] The nearest approach to a discussion of this question is in Jenkins *v.* Neff, note 151, 236–37, *supra*, where Mr. Justice Brewer quotes from the opinion of the same case in the appellate division of New York some remarks, which he says "in general we approve." In the appellate division Judge Woodward said: "The fact that in a given instance, by reason of an exercise of discretion as to the particular kind of securities purchased, a trust company may have a real or imaginary advantage over investors in the shares of national banks is not a sufficient foundation for declaring the assessment invalid." (Quoted from 62 N. Y. Supp. 321, 327.) And then he adds: "If the state refused to allow its trust companies to invest in United States securities there might be a far greater cause for grievance." (Quoted from 62 N. Y. Supp. 321, 328.) Any such cause for grievance would of course be a discrimination, not against national banks as federal instrumentalities, but against the federal borrowing power. And heavier state taxation of shares and franchises of corporations owning federal securities than of those of corporations not owning such securities would differ only in degree from prohibition of investment in such securities.

but in principles inhering in the federal system of government. Only by inference and analogy do the cases on the interpretation of the statute of Congress touch the question whether the imposition of heavier burdens on the franchises and shares of corporations owning federal securities than on other intangibles or on chattels and real estate can be regarded as an interference with the power of the United States to borrow money.

Yet the inference and the analogy are unescapable. If shares of stock in national banks whose capital is invested largely in federal securities may be taxed more heavily than other legal forms of property, manifestly the state may discriminate in like manner against the franchises and shares of other corporations owning federal securities. For, in the former instance, the discrimination may be adduced as an interference with two functions of the national government, whereas in the latter the question can be raised only with respect to one. It may therefore be taken as established that exemption of many kinds of property from state taxation does not deprive the state of power to tax franchises and shares of corporations having investments in federal securities.

Had the Supreme Court followed the implications of its declarations in *Boyer* v. *Boyer*,[168] it would have been compelled to pass judgment on the almost innumerable details of the taxing system of every state. The states would doubtless have been driven to abandon any attempt to tax shares of stock in national banks. The silence of Congress after the restricted interpretation put upon the phrase "other moneyed capital" is sufficient ratification of the existing rule as to taxation of shares in national banks. And this applies *a fortiori* to the absence of any rule that taxation of shares in corporations owning federal securities must be accompanied by similar taxation of all other forms of property. Any possible discrimination against the federal borrowing power is one that Congress might in all probability by direct legislation prevent. Congress evidently is satisfied with the exemption of United States bonds from direct taxation. This exemption, coupled with the fact that corporations engaged in mining, manufacturing, trade and transportation are almost invariably taxed, both on their franchises and on all their property with the exception of that invested in public securities, makes the absence of any tax on

[168] Note 90, *supra*.

their shares of stock of little practical importance. The value invested in federal securities may be molested only by taxation of the franchises and shares of stock of corporations which may own such securities. Such securities in the hands of individuals contribute nothing to the state fisc. Those in the hands of corporations cannot be taxed directly. In view of the extent to which individuals and corporations are taxed on all other kinds of property, it is most unlikely that exemptions here and there allowed, operate in any way to obstruct or discriminate against the federal borrowing power. Such occasional and isolated inequalities as may exist to the disadvantage of property which derives its value from United States bonds must be greatly outweighed by the aggregate of the many burdens borne by property in no way related to any interest of the federal government. The theoretical possibility of discrimination left open by the decisions is not destined to be realized in the actual results of the fiscal policy of any state.

4. *Summary and Conclusion*

In dealing with the problem whether taxes on shares of stock in national banks violate the permission granted to the states by Congress, the Supreme Court has avoided a dryly literal interpretation of the federal statute. It has expanded the words "at a greater rate" to make them include all forms of discrimination, and has restricted the natural meaning of "other moneyed capital" to confine it to capital which comes into fairly direct competition with national banks. In determining the significance of alleged discriminations in favor of other property, it has not been content to observe merely whether the state has failed to impose an equal burden on some other legal *res* which the law calls property and which in general it would call moneyed capital. In expanding one phrase of the statute and contracting the other, the judges have looked through legal form to economic substance. Any interpretation of "other moneyed capital" which excludes money loaned at interest or invested in insurance companies and trust companies must be due to other than verbal considerations. Nor is such an interpretation the product of an analysis of the legal characteristics of the property so excluded. It is reached by considering the economic relations of such property to that invested in national banks. The court has been concerned with

economic effects rather than with legal names, though it has felt compelled to label those economic effects according to legal nomenclature. As has been pointed out, this was not a necessary mode of procedure. Most of the alleged discriminations with which the court has had to deal have not fallen within the express terms of the limitations imposed by Congress. In deciding the cases which did not involve variations of rates where there were similar methods of assessment, the court could have sustained the tax on the shares of national banks without denying that the property with which the shares were compared was moneyed capital. The same decisions could have been reached by informing the complainant that he had not brought himself within the letter of the statute, and that by reason of economic considerations he had not brought himself within its spirit. The fact that the court has chosen to call its inquiry an interpretation of the meaning of language should not blind us to the considerations which have controlled its decisions. It has really been concerned, not with the legal characteristics of the property adduced for comparison, but with what gave value to that property.

When, however, we turn to the cases where no complaint is made of discrimination against a federal instrumentality, we find the legal characteristics of the subject taxed, of more controlling importance. As the law now stands, the test of whether a state tax is an interference with the federal borrowing power, is what subject is taxed, and not what gives value to the subject taxed or what determines the amount of the tax. The capital of a corporation is treated as but a name for the property of the corporation.[169] So a tax on the capital is a tax on the property in which it is invested. To the extent that such property consists of federal securities, it is totally outside the taxing power of the state. The shares of stock are a kind of property totally distinct in law from the property of the corporation. A tax on such shares is not removed from the power of the state even though its economic effect on the borrowing power of the United States is indistinguishable from that of a tax on the capital of the corporation or specifically on United States securities.

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[169] "The capital stock is nothing; a myth; a mere name, excepting in so far as it is represented by investments made with the money paid into the treasury of the corporation on account of such capital stock." Mr. Justice Paxon, in Appeal of Fox & Wife, 112 Pa. St. 337, 554, 4 Atl. 149 (1886).

This legalistic formalism appears subversive of the very basis on which rests the doctrine of the exemption of federal instrumentalities from state taxation. As Mr. Justice Strong said in *Railroad Company* v. *Peniston:*[170]

"It is, therefore, manifest that exemption of federal agencies from state taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, *but upon the effect of the tax;* that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power."[171]

All this applies *mutatis mutandis* to the exemption of federal securities from state taxation. Such exemption should depend, not on the nature of the property named by the state as the subject on

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[170] 18 Wall. 5 (1873).

[171] 18 Wall. 5, 36 (1873). Italics are author's. The economic argument was here used, however, to determine whether the subject on which the tax was levied could be regarded as a federal instrumentality. It was held that a tax on the property of a railroad corporation chartered by the federal government and subject to a large degree of control by the federal government was not an interference with the exercise of any power belonging to the federal government, and therefore not a tax on a federal instrumentality. The majority distinguished McCulloch *v.* Maryland (4 Wheat. 316) and Osborn *v.* Bank (9 Wheat. 738) on the ground that the taxes there held invalid were on the operations of a federal agency, and not on the property of a federal agent. Mr. Justice Bradley for the minority insisted that the relation between the Union Pacific and the federal government was such that the property of the road was an agency of the government. He argued that, if the roadbed might be taxed, it might be sold for non-payment of the tax and that this would prevent the road from fulfilling its obligations to the federal government. To tax the roadbed, he said, is to tax the very instrumentality which Congress desired to establish, since the track is as essential to the operations of the road "as the use of a currency, or the issue or purchase of bills of exchange is to the operations of a bank." The dispute between the majority and the minority was not whether a tax on a proper subject was invalid because of the inclusion of improper elements in assessing its value, but whether the subject taxed was itself an agency of the federal government.

In accord with Railroad Company *v.* Peniston, in sustaining taxes on property privately owned but used in performing services for the United States, are Baltimore Shipbuilding Co. *v.* Baltimore, 195 U. S. 375, 25 Sup. Ct. Rep. 50 (1904) and Gromer *v.* Standard Dredging Co., 224 U. S. 382, 32 Sup. Ct. Rep. 499 (1912). See also Ackerlind *v.* United States, 240 U. S. 531, 36 Sup. Ct. Rep. 438 (1916). State taxes have been held void where the subject taxed was a franchise obtained from the United States, California *v.* Central Pacific Railroad Co., 127 U. S. 1, 8 Sup. Ct. Rep. 1073 (1888), or included the business of sending telegraph messages for the United States, Williams *v.* Talledega, 226 U. S. 404, 33 Sup. Ct. Rep. 116 (1912). For a case declaring invalid a method of collecting a valid tax because the method interfered with an instrumentality of the national government, see Western Union Telegraph Co. *v.* Massachusetts, 125 Mass. 530 (1888).

which the tax falls, but on the effect of the tax. Otherwise the state by legislative legerdemain may make a tax on a federal instrumentality seem to be something different from what it really is, and thus do indirectly what it is forbidden to do directly.

It may, however, be doubted whether the Supreme Court has been as unmindful of economic considerations as some of its declarations would imply. It may be that the effect of the tax varies with the kinds of property on which it is levied. It may be also that the effect of the taxes which have been declared invalid was not so serious as was supposed and that the court has adopted technical legal distinctions in order to limit as narrowly as possible the economic effect of the earlier decisions. It is possible, too, that any decision on the subject under consideration must be in the nature of a somewhat arbitrary compromise between maintaining the interests of the nation and yet not unduly restricting the resources of the state. These suggestions will again be adverted to after consideration has been given to the cases on state taxation as an indirect regulation of interstate commerce.

(*To be continued.*)

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INDIRECT ENCROACHMENT ON FEDERAL AUTHORITY BY THE TAXING POWERS OF THE STATES.[1] II

II. REGULATIONS OF INTERSTATE COMMERCE

THE doctrine that a state cannot tax interstate commerce is derived from an interpretation of the clause in the Constitution granting to Congress the power to regulate such commerce. The steps in this interpretation are the declarations that taxation of commerce is a regulation thereof,[2] that the state cannot regulate those subjects of interstate commerce which are national in character,[3] and that exchange and transportation of commodities between the states are national in character.[4] State taxation which falls directly on exchange and transportation between the states has uniformly been held beyond the power of the state.[5] On the other hand, property within the state,[6] privileges granted by the state,[7] and intra-state commerce done within the state [8] are uniformly held proper subjects of state taxation. If the power to

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[1] For the general introduction to this discussion and for the first section dealing with "Interferences with Federal Instrumentalities," see 31 HARV. L. REV. 321–72 (January, 1918).

[2] The Passenger Cases, 7 How. 283 (1849).

[3] Cooley *v.* Board of Wardens of Philadelphia, 12 How. 299 (1851).

[4] Welton *v.* Missouri, 91 U. S. 275, 280 (1876).

[5] Case of the State Freight Tax, 15 Wall. (82 U. S.) 232 (1873); Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 5 Sup. Ct. Rep. 826 (1885); Robbins *v.* Shelby County Taxing District, 120 U. S. 489, 7 Sup. Ct. Rep. 592 (1887); Philadelphia & Southern Mail S. S. Co. *v.* Pennsylvania, 122 U. S. 326, 7 Sup. Ct. Rep. 1118 (1887); Leloup *v.* Port of Mobile, 127 U. S. 640, 8 Sup. Ct. Rep. 1380 (1888); McCall *v.* California, 136 U. S. 104, 10 Sup. Ct. Rep. 881 (1890); Crutcher *v.* Kentucky, 141 U. S. 47, 11 Sup. Ct. Rep. 851 (1891).

[6] Brown *v.* Houston, 114 U. S. 622, 5 Sup. Ct. Rep. 1091 (1885).

[7] Cases cited in notes 21, 23, 33, 35, 38, *infra.*

[8] Home Machine Company *v.* Gage, 100 U. S. 676 (1880); Ratterman *v.* Western Union Telegraph Co., 127 U. S. 411, 8 Sup. Ct. Rep. 1127 (1888); Pacific Express Co. *v.* Seibert, 142 U. S. 339, 12 Sup. Ct. Rep. 250 (1892); Emert *v.* Missouri, 156 U. S. 296, 15 Sup. Ct. Rep. 367 (1895); Williams *v.* Fears, 179 U. S. 270, 21 Sup. Ct. Rep. 128 (1900); Kehrer *v.* Stewart, 197 U. S. 60, 25 Sup. Ct. Rep. 403 (1905).

tax necessarily involved the power to destroy,[9] if the question were entirely one of power and not at all one of economics,[10] it would follow that no tax on these subjects could be held invalid as a regulation of interstate commerce.

Though the maxims quoted would preclude inquiry into the effect on interstate commerce of a tax imposed on a subject within the authority of the state, the inquiry is logically permissible. We may grant that a tax on a subject of interstate commerce is a regulation of such commerce. We may concede that some taxes levied on other subject matters are not regulations of interstate commerce. But we may still inquire whether other taxes on subjects not themselves interstate commerce may not properly be regarded as regulations of interstate commerce. And the Supreme Court holds that taxes on subjects not themselves interstate commerce are nevertheless regulations of such commerce, where in effect they discriminate against interstate commerce in favor of intra-state commerce.

1. *Taxes Discriminating against Interstate Commerce*

In *Welton* v. *Missouri*[11] the court held invalid a state statute imposing a tax nominally on peddlers, but defining a peddler as one who peddles goods which are not the growth, produce, or manufacture of the state. Mr. Justice Field declared that any tax which was levied on the sale of goods for the reason that they originated in other states was invalid as a regulation of interstate commerce. In answer to the contention of the state that the goods in question were no longer in the original packages, he said that the commercial power of Congress over commodities which have been brought into a state from other states "continues until the commodity has ceased to be the subject of discriminating legislation by reason of its foreign character."[12] A similar doctrine was laid down in *Darnell* v. *Memphis*,[13] which held that a state could not,

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[9] Chief Justice Marshall in McCulloch *v.* Maryland, 4 Wheat. 316, 431 (1819). See 31 Harv. L. Rev. 321.

[10] Mr. Justice Moody in Home Savings Bank *v.* Des Moines, 205 U. S. 503, 518, 27 Sup. Ct. Rep. 571 (1907). See 31 Harv. L. Rev. 343.

[11] 91 U. S. 275 (1876).

[12] 91 U. S. 275, 282 (1876).

[13] 208 U. S. 113, 28 Sup. Ct. Rep. 247 (1908). For other cases affirming the doctrine that a state cannot by taxation discriminate against interstate commerce, see

by exempting from its general property-tax, articles which were manufactured from the produce of the state, impose such a tax solely on goods manufactured from the produce of other states.

In these decisions the state tax was declared invalid as a regulation of interstate commerce, though the subjects of taxation were sales of goods within the state and personal property located within the state. In both cases the articles had lost their interstate character before they or their sales had become subject to the statute of the state. They were within the taxing power of the state in the same manner and to the same extent as articles of domestic origin were within the power of the state.[14] But the economic result of imposing heavier taxes on goods and the sales of goods of extra-state origin than on those of intra-state origin was to burden the future introduction of merchandise from other states, and thus to give an economic advantage to domestic producers. In deciding these cases, therefore, the Supreme Court applies an economic test to determine whether taxes, levied on subjects not in themselves interstate commerce, are nevertheless regulations of interstate commerce. In substance it declares a tax invalid solely because of objection to the measure by which the amount of the tax is determined. If the rate imposed had not been higher than that applied to goods of domestic origin, the tax would have been sustained. The taxes held unconstitutional would be made entirely valid by the imposition of similar taxes on goods of domestic origin.

2. *Taxes not Discriminating against Interstate Commerce*

If a state tax falls directly on a subject of interstate commerce, it is invalid notwithstanding the fact that the identical tax is

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Pierce *v.* The State, 13 N. H. 536, 582 (1843), *semble;* State *v.* North & Scott, 27 Mo. 464 (1858); Guy *v.* Baltimore, 100 U. S. 434 (1880); Tiernan *v.* Rinker, 102 U. S. 123 (1880); Walling *v.* Michigan, 116 U. S. 446, 6 Sup. Ct. Rep. 454 (1886); and *Ex parte* Stoddard, 35 Nev. 504, 131 Pac. 133 (1913). See also HALL, CASES ON CONSTITUTIONAL LAW, 1086, note 1. For cases sustaining seeming discriminations against interstate commerce, on the ground that the state had based its differences of treatment on a proper classification under the police power, see McGuire *v.* State, 42 Ohio St. 530 (1885); Reyman Brewing Co. *v.* Brister, 179 U. S. 445, 21 Sup. Ct. Rep. 201 (1900); Cox *v.* Texas, 202 U. S. 446, 26 Sup. Ct. Rep. 671 (1906); and State *v.* Parker Distilling Co., 236 Mo. 219, 139 S. W. 453 (1911).

[14] A non-discriminatory tax on goods of extra-state origin was sustained in Brown *v.* Houston, note 6, *supra.* A tax on all peddlers was sustained in Emert *v.* Missouri, note 8, *supra.*

imposed on corresponding intra-state commerce. "Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the state." [15] The question is treated as one of power and not of economics. The Supreme Court fixes its attention, not upon the economic results of the tax, but upon the legal *res* which is declared by the statute to be the subject on which the tax is imposed. This is not to say that economic considerations have been entirely neglected in determining what subjects of taxation are to be regarded as in themselves interstate commerce. But what the court considers in this connection is not the burden imposed by the particular tax before it, but the burden which would result if the subject were taxed to the point of extinction.

Where, however, the subject on which the tax is imposed is not itself interstate commerce, it is manifest that only by recourse to its economic effect on interstate commerce could it be declared a regulation of such commerce. But, with the exception of the cases involving discriminations against interstate commerce, the early decisions of the Supreme Court did not regard as important the measure by which the amount of a tax was determined, provided the subject on which the tax was levied was within the authority of the state. The subjects of taxation with which these cases have been concerned are acts, occupations, property, and privileges. The questions under consideration could of course arise only when the property was employed in interstate commerce, when the act or occupation was conducted in some connection with interstate commerce, or when the privilege was enjoyed by those engaged in whole or in part in interstate commerce.

A. TAXES ON PRIVILEGES [16]

It has never been urged that taxes on inheritances were regulations of interstate commerce, even when the property passing

[15] Mr. Justice Bradley in Robbins *v.* Shelby County, note 5, *supra.*

[16] "Privilege" is here used in the sense of some permission obtained from the state which might have been entirely withheld. The two such privileges involved in the decisions to be considered are the privilege of being a domestic corporation and the privilege of a foreign corporation to exercise its corporate powers within the state for the conduct of business which is not interstate commerce. "Privilege" is often used in a broader sense in speaking of "privilege taxes." See Mr. Justice Harlan in Western Union Telegraph Co. *v.* Kansas, 216 U. S. 1, 43, 30 Sup. Ct. Rep. 190 (1910):

by the inheritance derived its value from some connection with interstate commerce. The privilege taxes which have been challenged as regulations of interstate commerce have been those levied on the privileges of being a corporation, or of exercising corporate powers within the state. The state may decline to create a corporation. It may decline to permit a foreign corporation to enter the state to carry on intra-state commerce. From the power of the state to forbid has been inferred the power to burden as it pleases.

(*a*) *The Doctrine of Unlimited Power*

In *State Tax on Railway Gross Receipts*,[17] decided in 1872, the court sustained a Pennsylvania statute imposing on every railroad company incorporated under the laws of Pennsylvania a tax of three-fourths of one *per centum* upon the gross receipts of said company. One of the grounds on which the decision was based is thus stated in the opinion of the court:

> "It is not to be questioned that the States may tax the franchises of companies created by them, and that the tax may be proportioned either to the value of a franchise granted, or to the extent of its exercise; nor is it deniable that gross receipts may be a measure of proximate value, or, if not, at least of the extent of enjoyment. If the tax be, in fact, laid upon the companies, adopting such a measure imposes no greater burden upon any freight or business from which the receipts come than would an equal tax laid upon a direct valuation of the franchise. In both cases, the necessity of higher charges to meet the exaction is the same." [18]

It is to be noted that Mr. Justice Strong cites no authority for this doctrine that the state may measure a tax on corporate fran-

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"Any occupation, business, employment, or the like, affecting the public, may be classed and taxed as a privilege," citing Knoxville & O. R. Co. *v.* Harris, 99 Tenn. 684, 43 S. W. 115 (1897). Privilege taxes of this more general character will be dealt with in a succeeding section under the head of "taxes on acts and occupations."

[17] 15 Wall. (82 U. S.) 284 (1873).

[18] 15 Wall. 284, 296 (1873). The other reason given for the decision was that the tax was laid "upon a fund which has become the property of the company" and "which has lost its distinctive character of freight earned, by having become incorporated into the general mass of the company's property." This ground of the decision was subsequently discountenanced in Philadelphia & Southern Mail S. S. Co. *v.* Pennsylvania, note 5, *supra*.

chises granted by it in any way that it pleases. Mr. Justice Miller dissented. With him concurred Justices Field and Hunt. The dissenting opinion lays emphasis on the fact that the imposition of the tax is in reality on transportation, and that it must be paid out of the receipts thereof,[19] and must therefore increase the price of such transportation. No attention was paid specifically to the argument of the majority that the tax was justified, because of the power of the state to deny the privilege of incorporation. The reasoning, however, was sufficiently broad to cover the contention:

"I lay down the broad proposition that by no device or evasion, by no form of statutory words, can a State compel citizens of other States to pay to it a tax, contribution, or toll, for the privilege of having their goods transported through that State by the ordinary channels of commerce." [20]

In *Delaware Railroad Tax*,[21] decided the following year, the court, in unanimously sustaining a Delaware statute imposing a tax on a Delaware corporation, expressed the doctrine as follows:

"As we construe the language of the fourth section, the tax is neither imposed upon the shares of the individual stockholders nor upon the property of the corporation, but is a tax upon the corporation itself, measured by a percentage upon the cash value of a certain proportional part of the shares of its capital stock; a rule which, though an arbitrary one, is approximately just, at any rate is one which the legislature of Delaware was at liberty to adopt.

"The State may impose taxes upon the corporation as an entity existing under its laws, as well as upon the capital stock of the corporation or its separate corporate property. And the manner in which its value shall be assessed and the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion. It is not for us to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the legislature of the State; our only concern is with the validity of the tax; all else lies beyond the domain of our jurisdiction." [22]

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[19] Mr. Justice Miller asks whether the tax is "within the evil intended to be remedied by the commerce clause of the Constitution" and answers: "It seems to me that to hold that the tax on freight is within it, and that on gross receipts arising from such transportation is not, is 'to keep the word of promise to the ear and break it to the hope.'" 15 Wall. 284, 298 (1873).

[20] 15 Wall. 284, 299 (1873).

[21] 18 Wall. (85 U. S.) 206 (1874).

[22] 18 Wall. 206, 231 (1874).

In *Railroad Co.* v. *Maryland*[23] the court sustained a stipulation in the charter of a corporation created by the state of Maryland that the corporation should pay to the state in January and July, in each and every year, one-fifth of the whole amount which may be received for the transportation of passengers on said railroad by said company during six months last preceding. Since the corporation was engaged in transportation between Baltimore and Washington, the receipts which were made the measure of the annual payment were in large part receipts from interstate commerce. In the opinion of Mr. Justice Bradley, it was stated that it would have been possible for the state to construct a railroad between Baltimore and Washington, and exact such compensation for transportation on such road as it chose.

"As before said, the State could have built the road itself and charged any rate it chose, and could thus have filled the coffers of its treasury without being questioned therefor. How does the case differ, in a constitutional point of view, when it authorizes its private citizens to build the road and reserves for its own use a portion of the earnings? We are unable to see any distinction between the two cases. In our judgment there is no solid distinction. If the State, as a consideration of the franchise, had stipulated that it should have all the passenger-money, and that the corporation should have only the freight for the transportation of merchandise, and the corporation had agreed to those terms, it would have been the same thing. It is simply the exercise by the State of absolute control over its own property and prerogatives." [24]

The fact that this exaction by the state would affect interstate transportation was said to be not material, and it was pointed out that the same result follows from every burden or tax imposed on corporations engaged in interstate commerce.

"The State is conceded to possess the power to tax its corporations; and yet every tax imposed on a carrier corporation affects more or less the charges it is compelled to make upon its customers. So, the State has an undoubted power to exact a bonus for the grant of a franchise, payable in advance or *in futuro;* and yet that bonus will necessarily affect the charge upon the public which the donee of the franchise will be obliged to impose. The stipulated payment in this case, indeed, is nothing more

[23] 21 Wall. (88 U. S.) 456 (1875).

[24] 21 Wall. 456, 472 (1875).

nor less than a bonus; and so long as the rates of transportation are entirely discretionary with the States, such a stipulation is clearly within their reserved powers." [25]

No authorities were cited for the decision of the court. The brief dissenting opinion of Mr. Justice Miller was as follows:

"I am of opinion that the statute of Maryland requiring the railroad company to pay into the treasury of the State one-fifth of the amount received by it from passengers on the branch of the road between Baltimore and Washington, confined as it is exclusively to passengers on that branch of the road, was intended to raise a revenue for the State from all persons coming to Washington by rail, and had that effect for twenty-five years, and that the statute is, therefore, void within the principle laid down by this court in *Crandall* v. *Nevada*." [26]

The foregoing cases involved taxation on domestic corporations. The absolute power of the state was founded on the fact that it might have declined to create the corporation. The franchise that could be denied could be taxed as the state pleases. In *Maine* v. *Grand Trunk Railway Co.*[27] the same doctrine was applied to a foreign corporation which had leased the rights and privileges of a domestic corporation. The statute under which the tax was levied imposed on every corporation, person, or association operating a railroad in the state "an annual excise tax for the privilege of exercising its franchises." The majority held that the tax was levied on a privilege entirely within the discretion of the state to grant or withhold, and that the "character of the tax, or its validity, is not determined by the mode adopted in fixing its amount." [28] The amount of the tax in question was determined by applying the statutory rate to a sum ascertained by multiplying the average receipts per mile over the whole system of the road by the number of miles in the state. This measure clearly included receipts from interstate, as well as from intra-state, commerce. The minority, consisting of Justices Bradley, Harlan, Lamar, and Brown, maintained that the tax, though called one on a franchise, was, in fact, one on the receipts of the company derived from international transportation. The precedents on which they relied involved taxes

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[25] 21 Wall. 456, 473 (1875).

[26] 21 Wall. 456, 475 (1875).

[27] 142 U. S. 217, 12 Sup. Ct. Rep. 121 (1891).

[28] 142 U. S. 217, 228, 12 Sup. Ct. Rep. 121 (1891).

imposed, not on some privilege within the grant of the state, but on receipts from interstate commerce,[29] or on engaging in a specified business which was in part interstate commerce.[30] In these cases the subject on which the tax was levied was held to be beyond the power of the state. The majority, on the other hand, rested the decision on the authority of *Home Ins. Co.* v. *New York*,[31] sustaining a tax on the franchise of a domestic corporation. They must therefore have regarded the tax as imposed on the privilege of a foreign corporation either to succeed to the rights of a domestic corporation, or to be admitted to the state to carry on intra-state commerce, for these were the only privileges which the state might have withheld. The language of the statute is sufficiently broad to bring the case within the authority of the precedents relied on by the minority. But the difference of opinion on this point does not affect the authority of the case for the proposition that the validity of the tax depends on the subject on which it is levied, and not on the measure by which its amount is determined. "There is," said Mr. Justice Field for the majority, "no levy by the statute on the receipts themselves, either in form or fact; they constitute, as said above, simply the means of ascertaining the value of the privilege conferred." [32]

In *Ashley* v. *Ryan*[33] the court sustained unanimously a statute of Ohio which required a fee for filing with the secretary of the state, articles of agreements of consolidation of different corporations. The amount of the fee was fixed by a small percentage of the total capital stock, and it was alleged that this requirement was a regulation of interstate commerce. In view of subsequent decisions, the opinion of Mr. Justice White is of more than usual importance. He presents the theory underlying the decision as follows:

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[29] Philadelphia & Southern Mail S. S. Co. *v.* Pennsylvania, note 5, *supra.*

[30] Crutcher *v.* Kentucky, note 5, *supra;* Leloup *v.* Port of Mobile, note 5, *supra;* Pickard *v.* Pullman Southern Car Co., 117 U. S. 34, 6 Sup. Ct. Rep. 635 (1886); Norfolk & W. R. Co. *v.* Pennsylvania, 136 U. S. 114, 10 Sup. Ct. Rep. 958 (1890).

[31] 134 U. S. 594, 10 Sup. Ct. Rep. 593 (1889). Though the tax was measured by the capital stock, part of which was invested in United States bonds, it was held not to be an unconstitutional interference with the federal borrowing paper. See pages 334–35, *supra.*

[32] 142 U. S. 217, 229, 12 Sup. Ct. Rep. 121 (1891). For a re-interpretation of the Maine Case, see Galveston, H. & S. A. R. Co. *v.* Texas, note 41, *infra.*

[33] 153 U. S. 436, 14 Sup. Ct. Rep. 865 (1894).

"The purpose of the tender of the articles of consolidation to the Secretary of State was to secure to the consolidated company certain powers, immunities, and privileges which appertain to a corporation under the laws of Ohio. The rights thus sought could only be acquired by the grant of the State of Ohio, and depended for their existence upon the provisions of its laws. Without that State's consent they could not have been procured. . . .

"Hence, in seeking to file its articles of incorporation, the company was applying for privileges, immunities, and powers which it could by no means possess, save by the grace and favor of the constitution of the State of Ohio and the statutory provisions passed in accordance therewith. At the time the articles were presented for filing, the statute law of the State charged the parties with notice that the benefits which it was sought to procure could not be obtained without payment of the sum which the Secretary of State exacted. As it was within the discretion of the State to withhold or grant the privilege of exercising corporate existence, it was, as a necessary resultant, also within its power to impose whatever conditions it might deem fit as prerequisite to corporate life. The act of filing, constituting, as it did, a claim of a right to the franchise granted by the state law, carried with it a voluntary assumption of any burden with which the privilege was accompanied, and without which the right of corporate existence could not have been procured. We say *voluntary* assumption, because, as the claim of the franchise was voluntary, the assumption of the privilege which resulted from it partook necessarily of the nature of the claim for corporate existence. Having thus accepted the act of grace of the State and taken the advantages which sprang from it, the company cannot be permitted to hold on to the privilege or right granted, and at the same time repudiate the condition by the performance of which it could alone obtain the privilege which it sought. . . .

"It follows from these principles that a State, in granting a corporate privilege to its own citizens, or, what is equivalent thereto, in permitting a foreign corporation to become one of the constituent elements of a consolidated corporation organized under its laws, may impose such conditions as it deems proper, and that the acceptance of the franchise in either case implies a submission to the conditions without which the franchise could not have been obtained." [34]

Ten years later, in two unanimous decisions, the Supreme Court sustained taxes on the local business of foreign corporations and dismissed as immaterial the contentions that, because the taxes

[34] 153 U. S. 436, 440–43, 14 Sup. Ct. Rep. 865 (1894).

imposed economic burdens on interstate commerce, they were therefore invalid regulations of such commerce. *Pullman Co.* v. *Adams*[35] involved a tax on sleeping-car companies carrying passengers from one point to another within the state. The tax was $100, plus twenty-five cents per mile for each mile of railroad track over which the company runs. The company offered to show that the receipts from intra-state passengers did not equal the expenses chargeable against such receipts. On the assumption that the company was legally free to abandon its intra-state business,[36] the court held that it was not important that there were no profits on that business, and that the tax would have to be paid from interstate receipts, saying: "The company cannot complain of being taxed for the privilege of doing local business which it is free to renounce. Both parties agree that the tax is a privilege tax."[37]

Pullman Co. v. *Adams* was quoted with approval in *Allen* v. *Pullman's Palace Car Co.*,[38] which sustained a tax of $3,000 on sleeping-car companies for one or more passengers taken up at one point in the state and delivered at another point within the state. But, in rejecting the contention that, since the intra-state business was such a small part of the total business, the statute was but a thinly disguised attempt to tax the privilege of interstate traffic, Mr. Justice Day remarked:

> "If the payment of this tax was compulsory upon the company before it could do a carrying business within the state, and the burden of its payment, because of the minor character of the domestic traffic, rested mainly upon the receipts from interstate traffic, there would be much force in this objection."[39]

This reference to the possible significance of the economic burden on interstate commerce must be taken as merely a qualification of the implication that the state cannot require payment of a tax on intra-state commerce as a condition of continuing to engage in interstate commerce; for the passage in the opinion immediately following that quoted above reads as follows:

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[35] 189 U. S. 420, 23 Sup. Ct. Rep. 494 (1903).

[36] This assumption was based on the interpretation of the state constitution given by the state court.

[37] 189 U. S. 420, 422, 23 Sup. Ct. Rep. 494 (1903).

[38] 191 U. S. 171, 24 Sup. Ct. Rep. 39 (1903).

[39] 191 U. S. 171, 181, 24 Sup. Ct. Rep. 39 (1903).

"Upon this proposition we are unable to distinguish this case from *Pullman Co.* v. *Adams*, 189 U. S. 420, 47 L. Ed. 877, 23 Sup. Ct. Rep. 494, decided at the last term, wherein it was held that the privilege tax imposed by the state of Mississippi, upon each car carrying passengers from one point in the state to another therein, was a valid tax, notwithstanding the fact that the company offered to show that its receipts from the carrying of the passengers named did not equal the expenses chargeable against such receipts. This conclusion was based upon the right of the company to abandon the business if it saw fit." [40]

It is obvious from these two decisions that the court was still interested exclusively in the legal *res* which was the subject of the tax. The next case to be considered is *Galveston, H. & S. A. R. Co.* v. *Texas*,[41] decided five years later. The tax there in issue was imposed on railroad corporations and other persons owning or controlling any line of railroad wholly within the state. Neither the majority nor the minority treated the tax as on a privilege within the power of the state to withhold. The minority deemed it an occupation tax and valid, in spite of the fact that the measure of the tax included receipts from interstate commerce. The majority held that the tax was imposed directly on the receipts, and was therefore invalid. Both majority and minority were looking merely at the subject on which the tax was laid, although Mr. Justice Holmes for the majority declared that, "neither the state courts nor the legislatures, by giving a tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect." [42] Fuller consideration of the case will be given in a later section dealing with taxes on occupations. Attention is called to it at this point for the bearing which the division of opinion among the judges has on the next case to be considered. In the Galveston Case the majority was composed of Mr. Justice Holmes, who wrote the opinion, and Justices Brewer, Peckham, Day, and Moody. The dissenting judges were Mr. Justice Harlan, who wrote the opinion, and Chief Justice Fuller, and Justices White and McKenna.

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[40] 191 U. S. 171, 181–82, 24 Sup. Ct. Rep. 39 (1903).

[41] 210 U. S. 217, 28 Sup. Ct. Rep. 638 (1908).

[42] 210 U. S. 217, 227, 28 Sup. Ct. Rep. 638 (1908).

(*b*) *The Modification of the Doctrine of Unlimited Power*

Thus far, as we have seen, the doctrine that a state may tax as it pleases any privilege that it may withhold has always had the assent of a majority of the Supreme Court. But in 1910 came two decisions which seem to mark a new departure. The majority seems to have become a minority. This conclusion, however, cannot be stated with certainty, since in both these cases, *Western Union Telegraph Co.* v. *Kansas*[43] and *Pullman Co.* v. *Kansas*,[44] the majority of the court did not fully agree in the reasons for their decision. Mr. Justice Harlan wrote the opinion of the court in both cases. With him concurred Justices Brewer and Day. Mr. Justice White filed separate concurring opinions. Both Mr. Justice Moody and Mr. Justice Peckham were absent from the bench on account of illness when the cases were decided. But it was announced that the former approved of Mr. Justice Harlan's opinion in the Western Union Case, and that the latter agreed with the minority. Mr. Justice Holmes wrote dissenting opinions in the two cases, in which opinions Chief Justice Fuller concurred. Mr. Justice McKenna concurred in the dissenting opinion in the Kansas Case, and his dissent in the Pullman Case was separately recorded.

The tax involved in the two cases was measured by applying scheduled rates to the total capital stock. So far as the wording of the statute indicates, it was imposed on all corporations, domestic and foreign, exercising their corporate powers within the state. But, as the case came before the court, both the majority and minority treated the question as one involving the propriety of the exaction on foreign corporations as a condition of doing local business within the state. Kansas had obtained decrees in her own supreme court, ousting and restraining the corporations from doing any business that was wholly internal to the state and not pursuant to some arrangement with the federal government. The basis for the decree was the non-payment of the tax. The question before the Supreme Court was whether ouster from all purely local business in default of such payment was a regulation of interstate commerce.

The precise issue which the court had to meet will be made clearer by quotations from the dissenting opinions of Mr. Justice

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[43] 216 U. S. 1, 30 Sup. Ct. Rep. 190 (1910).

[44] 216 U. S. 56, 30 Sup. Ct. Rep. 232 (1910).

Holmes. In the Western Union Case he says: "I confess my inability to understand how a condition can be unconstitutional when attached to a matter over which the state has absolute arbitrary power." [45] He points out that Kansas has not attempted to impose an absolute liability, but has merely said that if the company wishes to do local business it must pay a certain sum.

"It does not matter if the sum is extravagant. Even in the law the whole generally includes its parts. If the state may prohibit, it may prohibit with the privilege of avoiding the prohibition in a certain way. . . . I quite agree that we must look through form to substance. The whole matter is left in the Western Union's hands. If the license fee is more than the local business will bear, it can stop that business and avoid the fee. . . . If the imposition were absolute, or if the attempt were to oust the corporation from the state if it did not pay, the arguments that prevail would be apposite. But the state seeks only to oust the corporation from that part of its business that the corporation has no right to do unless the state gives leave." [46]

Mr. Justice Holmes recognizes that "the local and interstate business may be necessary each to the other to make the whole pay." [47] But this he dismisses as immaterial, on the ground that "to deny the right of Kansas to do as it chooses with the local business is to require the local business to help sustain that between the states." [48] This point he reinforces in the Pullman Case: [49]

"I am quite unable to believe that an otherwise lawful exclusion from doing business within a state becomes an unlawful or unconstitutional burden on commerce among states because, if it were let in, it would help to pay the bills. Such an exclusion is not a burden on the foreign commerce at all; it simply is the denial of a collateral benefit. If foreign commerce does not pay its way by itself, I see no right to demand an entrance for domestic business to help it out."

In concluding his opinion the learned justice goes back to the *dicta* of Chief Justice Marshall for support:

"That the local business of telegraph and railroad companies may be taxed by the states has been held over and over again, with full accept-

[45] 216 U. S. 1, 54, 30 Sup. Ct. Rep. 190 (1910).
[46] 216 U. S. 1, 53, 30 Sup. Ct. Rep. 190 (1910).
[47] *Ibid.*
[48] 216 U. S. 1, 54, 30 Sup. Ct. Rep. 190 (1910).
[49] 216 U. S. 56, 76, 30 Sup. Ct. Rep. 232 (1910).

ance of the doctrine that *quoad hoc*, 'the power to tax involves the power to destroy' (*M'Culloch* v. *Maryland*, 4 Wheat. 316, 431, 4 Law Ed. 579, 697), — essentially the doctrine on which the power of the states to tax interstate commerce was denied. . . .

"I do not see how the reasoning that denies the power of the State to tax one kind of commerce (interstate) and asserts it with regard to the other (intra-state) can be reconciled with the denial of the power of the state to exclude the latter altogether, or to tax it for whatever sum it likes. The right to tax 'in its nature acknowledges no limits.'" [50]

There can be no doubt that Mr. Justice Holmes is correctly applying the reasoning of many of his predecessors. If such reasoning was essential to the decisions, he seems on firm ground when he says that he thinks "the tax in question . . . was lawful under all the decisions of this court until last week." [51] The majority can escape from the force of Mr. Justice Holmes's appeal to authority only by breaking entirely new paths, or by showing that the precise question before them differs from those involved in the earlier decisions. Both of these methods are adopted.

Mr. Justice White in his concurring opinion in the Western Union Case makes no reference to any of the precedents. He lays emphasis upon the fact that the Western Union Company has been doing both local and interstate business in Kansas for a long time; that it came in as the result of the implied invitation or tacit consent of the state; that it had expended large sums of money in the state, and that its investment was still there; that the continued beneficial existence of the investment depended upon the right to use the property for the purpose for which it was acquired, *i. e.*, for both interstate and local business. These facts he brings to bear upon the contention of the state that the tax is not a burden on interstate commerce, because the company may avoid the tax by abandoning its local business. The abandonment of the local business, he says, would result in rendering worthless and, in effect, confiscating the property established for the purpose of doing such local business. He held, therefore, that this was no case for the doctrine of election or voluntary assumption of an unconstitutional burden.

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[50] 216 U. S. 56, 76, 77, 30 Sup. Ct. Rep. 232 (1910).

[51] 216 U. S. 56, 77, 30 Sup. Ct. Rep. 232 (1910).

"The investment is there, and its magnitude, it is fair to assume, is, in part, a resultant of the requirements of the local business. The continued beneficial existence of the investment depends upon the right to use the property for the purpose for which it was acquired, that is, for both interstate and local business. The state law takes the property, or what is equivalent thereto, imposes an unconstitutional and confiscatory burden, upon the condition that such burden be discharged or the local business be abandoned. What possible election can there be? The property is in the State. It has been invested therein for the very purpose of doing local as well as other business. If the unconstitutional burden be not assumed, local business must cease, and hence the property established for the purpose of doing the local business becomes worthless and is in effect confiscated. If, on the other hand, the unconstitutional burden be borne, a like result takes place. . . . The view taken by me does not deprive the State of power to exert its authority over the corporation and its property in the amplest way subject to constitutional limitations. It simply prevents the State from driving out the corporation which is in the State by imposing upon it arbitrary and unconstitutional conditions, when upon no possible theory could the right to exact them exist, except upon the assumption that the corporation is not in the State, and that the illegal exactions are the price of the privilege of allowing it to come in." [52]

This position of Mr. Justice White seems to be based on the due-process clause rather than on the commerce clause. Mr. Justice Holmes meets it as follows:

"Finally, in the absence of contract, the power of the state is not affected by the fact that the corporation concerned already is in the state, or even has been there for some time. . . . Whatever the corporation may do or acquire there is infected with the original dependence upon the will of the state. . . . But furthermore, it is a short answer to this part of the argument that, in the present case, according to the decisions relied upon by the majority, the state could not have prevented the entry of the corporation, because it entered for the purpose of commerce with other states." [53]

The debate between Mr. Justice White and Mr. Justice Holmes is continued in their opinions in the Pullman Case. The former concedes the general principle relied on by his colleague. Wherever

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[52] 216 U. S. 1, 50–51, 30 Sup. Ct. Rep. 190 (1910).
[53] 216 U. S. 1, 55–56, 30 Sup. Ct. Rep. 190 (1910).

the state has the absolute power to exclude, he says, it may impose such conditions as it pleases on the right to come in. If "a foreign corporation avails of such a right, it may not assail the constitutionality of the condition because, by accepting the privilege, it has voluntarily consented to be bound by the conditions." [54] In such a case, "the absolute power of the state is the determining factor, and the validity of the condition is immaterial." [55] But this principle is said to have no application to a foreign corporation engaged in interstate commerce, for its right to come into the state to engage in such commerce is independent of the will of the state. "The power to exclude in such a case being only relative, affords no warrant for the exertion by the state of an absolute prohibition." [56] The learned justice goes so far as to say that "where the right to do an interstate business exists, without regard to the assent of the state, a state law which arbitrarily forbids a corporation from carrying on with its interstate business a local business would be a direct burden upon interstate commerce," [57] and in conflict with the principle that "a state may not exert its concededly lawful powers in such a manner as to impose a direct burden on interstate commerce." [58]

As to this last point, Mr. Justice Holmes replies that it seems to him "a proposition not to be assumed, but to be proved." [59] And he rejects it. And with respect to his colleague's distinction between absolute and relative powers of exclusion, he observes:

> "I do not see how or why the right of a state to exclude a corporation from internal traffic is complicated or affected in any way by the fact that the corporation has a right to come in for another purpose. It is said that in such a case the power of the state is only relative, and in the sense that it is confined to the local business, I agree. But, in the sense that it is not absolute over that local business, the statement seems to me merely to beg the question that is discussed. I do not see why the power is less absolute over that because it does not extend to something else." [60]

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[54] 216 U. S. 56, 66, 30 Sup. Ct. Rep. 232 (1910).
[55] *Ibid.*
[56] 216 U. S. 56, 68, 30 Sup. Ct. Rep. 232 (1910).
[57] *Ibid.*
[58] 216 U. S. 56, 65, 30 Sup. Ct. Rep. 232 (1910).
[59] 216 U. S. 56, 76, 30 Sup. Ct. Rep. 232 (1910).
[60] 216 U. S. 56, 77, 30 Sup. Ct. Rep. 232 (1910).

Here, again, Mr. Justice Holmes follows faithfully the footsteps of his forerunners. Mr. Justice White is opening new paths. He says, in effect, that the right of the state to exclude a foreign corporation from doing local business in connection with interstate business ought not to be recognized, because the inability to carry on local business in connection with the interstate business imposes a direct burden on interstate commerce. The extent to which this is true will of course depend on the kind of business in question. It will appear that in the Western Union Case and in the decisions which have followed it, the determination of the question whether the tax is a regulation of interstate commerce is dependent on the nature of the business in question,[61] as well as on the measure by which the amount of the tax is determined.

Mr. Justice Harlan's opinion for the court in the Western Union Case took a somewhat broader ground than that chosen by Mr. Justice White. It stands for the more general proposition that, wherever the abandonment of local business would appreciably increase the cost of conducting the interstate business, the state cannot measure a tax on the local business by a method which results in imposing a substantial burden on the interstate business. In reply to the claim that the state had no intention to embarrass interstate commerce, but only to prevent the company from doing local business without complying with the statute, it was said:

"But the disavowal by the State of any purpose to burden interstate commerce cannot conclude the question as to the fact of such a burden being imposed, or as to the unconstitutionality of the statute as shown by its necessary operation upon interstate commerce. If the statute, reasonably interpreted, either directly or by its necessary operation, burdens interstate commerce, it must be adjudged to be invalid, whatever may have been the purpose for which it was enacted, and although the company may do both interstate and local business. This court has repeatedly adjudged that in all such matters the judiciary will not regard mere forms, but will look through forms to the substance of things. . . .[62]

"The right of the Telegraph Company to continue the transaction of local business in Kansas could not be made to depend upon its submission to a condition prescribed by that State, which was hostile both to the letter and spirit of the Constitution. The company was not

[61] This was in type before the author had received the advance sheets containing the opinion in Looney *v.* Crane Co., note 114, *infra*. See pages 600–618, *infra*.

[62] 216 U. S. 1, 27, 30 Sup. Ct. Rep. 190 (1910).

bound, under any circumstances, to surrender its constitutional exemption from state taxation, direct or indirect, in respect of its interstate business and its property outside of the State, any more than it would have been bound to surrender any other right secured by the National Constitution." [63]

The opinion thus stands for the doctrine, that when the measure adopted for determining the amount of a tax on the privilege of doing local business is such as in reality to impose a burden on interstate commerce, that measure cannot be constitutionally applied. The power to burden interstate commerce does not exist merely because of the general power of the state to exclude a corporation from doing local business.

In every case, then, the question at issue is whether a tax imposed by the state really burdens interstate commerce. Whether it does so will depend not only upon the measure by which the amount of the tax is determined, but also upon the character of the business to which the tax is applied.[64] In *Pullman Co.* v. *Adams*[65] the decision was based on the assumption that the company was legally free to abandon its local business. The court stated that, if such were not the case, the tax would be invalid. No consideration was given to the fact that the abandonment of local business might result in such economic loss to the interstate business, that the legal freedom to abandon the local business would not be exercised, even though the tax on the local business exceeded the net income from that business. In *Western Union Telegraph Co.* v. *Kansas*,[66] however, the court looked at the contention that the corporation might escape the tax by abandoning its local business, not from the standpoint of the legal possibility of such abandonment, but from the standpoint of its economic effect. If the company could not abandon its local business without economic loss to its interstate business, the state cannot impose a tax on the local business which is in reality a burden on the interstate business. In the language of Mr. Justice Harlan:

"We cannot fail to recognize the intimate connection which, at this day, exists between the interstate business done by interstate companies and the local business which, for the convenience of the people, must be

[63] 216 U. S. 1, 47–48, 30 Sup. Ct. Rep. 190 (1910).

[64] See note [61], *supra*.

[65] Note 35, *supra*.

[66] Note 43, *supra*.

done or can generally be better and more economically done by such interstate companies rather than by domestic companies organized to conduct only local business.[67]

"The state knows that the Telegraph Company, in order to accommodate the general public and make its telegraphic system effective, must do all kinds of telegraphic business. Yet, it seeks to enforce a regulation requiring the company by paying the 'fee' in question to assent to its interstate business being burdened and its property outside of Kansas being taxed in order that it may continue to conduct a business concededly beneficial to the public — a right lawfully acquired from the United States when Kansas was a Territory, and exercised, consistently with the statutes of the State for many years after Kansas was admitted as a State of the Union. . . .[68]

"It is easy to be seen that if every State should pass a statute similar to that enacted by Kansas not only the freedom of interstate commerce would be destroyed, the decisions of this court nullified and the business of the country thrown into confusion, but each State would continue to meet its own local expenses, not only by exactions that directly burdened such commerce but by taxation upon property situated beyond its limits." [69]

Owing to the difference between the opinion of Mr. Justice Harlan and that of Mr. Justice White, it is difficult to state the proposition for which the Western Union Case and the Pullman Case stand. Mr. Justice White's opinion in the Pullman Case would seem to indicate that he would permit Kansas to impose such taxes as it pleases on domestic corporate franchises. Yet he said in the Western Union Case that he did "not wish to be understood as dissenting in any respect from the fundamental principle which the opinion of the court embodies and applies." [70] Yet the fundamental principle of that opinion is directly opposed to the fundamental principle of Mr. Justice White's opinion in *Ashley* v. *Ryan*.[71] But the learned justice tells us that the doctrine of

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[67] 216 U. S. 1, 37, 30 Sup. Ct. Rep. 190 (1910).

[68] 216 U. S. 1, 33, 30 Sup. Ct. Rep. 190 (1910).

[69] 216 U. S. 1, 37, 30 Sup. Ct. Rep. 190 (1910).

[70] 216 U. S. 1, 52, 30 Sup. Ct. Rep. 190 (1910).

[71] Note 33, *supra*. In a *dictum* in his opinion in the Western Union Case Mr. Justice Harlan makes it evident that he would apply the doctrine of the decision to domestic corporations engaged in other kinds of interstate commerce than transportation. At 216 U. S. 1, 36–37, 30 Sup. Ct. Rep. 190 (1910), he says:

"If a domestic corporation engaged in the business of soliciting orders for goods manufactured, sold, and delivered in a State, should in addition solicit orders for goods

some of the earlier cases in which he concurred did not represent his individual convictions.

"When first after the duty came to me of taking part in the work of the court the question arose of the right of a State in cases where it had absolute authority to impose an unconstitutional condition as a prerequisite to the right to do local business, my individual convictions were suppressed and my opinion yielded because of the conception that it was my duty to enforce in such a case the previous rulings of the court, however much as an original question I would have held a contrary view. But because my convictions were thus yielded in such a case affords no reason why I now should assent to extending the doctrine of the previous cases to conditions to which, in my opinion, they do not apply." [72]

Mr. Justice Harlan does not recognize that his opinion is in any way inconsistent with previous decisions. He prefaces his analysis of the situation involved in the case at bar with an extended review of earlier decisions. But these were cases in which the court held that the tax was imposed on a subject itself interstate commerce.[73] He dismisses the contention that earlier cases had established that a state may impose on foreign corporations such terms as it pleases, by pointing out that "those were cases in which the particular foreign corporation before the court was engaged in ordinary business, and not directly or regularly in interstate or foreign commerce." [74] *Pullman Co.* v. *Adams* [75] he explains by saying that the tax there involved was not at all disproportioned to the

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manufactured in and to be brought from another State for delivery, could the former State make it a *condition* of the right to engage in local business within its limits that the corporation pay a given percentage of *all* fees or commissions received by it in its business, interstate and domestic? There can be but one answer to this question, namely, that such a condition would operate as a direct burden on interstate commerce, and therefore would be unconstitutional and void. Consistently with the Constitution, no court could, by any form of decree, recognize or give effect to or enforce such a condition."

This *dictum* is directly contrary to Ficklen *v.* Shelby County Taxing District, 145 U. S. 1, 12 Sup. Ct. Rep. 810 (1892). In that case, however, Mr. Justice Harlan dissented.

[72] 216 U. S. 56, 74, 30 Sup. Ct. Rep. 232 (1910).

[73] McCall *v.* California, note 5, *supra;* Crutcher *v.* Kentucky, note 5, *supra;* Gloucester Ferry Co. *v.* Pennsylvania, note 5, *supra;* Leloup *v.* Port of Mobile, note 5, *supra;* Galveston, H. & S. A. R. Co. *v.* Texas, note 41, *supra;* Henderson *v.* New York, 92 U. S. 950 (1875); Brimmer *v.* Rebman, 138 U. S. 78, 11 Sup. Ct. Rep. 213 (1891).

[74] 216 U. S. 1, 33, 30 Sup. Ct. Rep. 190 (1910).

[75] Note 35, *supra.*

local business, and was, therefore, "not to be regarded as a mere device to reach or burden the interstate commerce of the company." *Allen* v. *Pullman's Palace Car Co.*[76] he dismisses by quoting from the opinion to the effect, that the statute sustained "applied 'strictly to business done (by sleeping-car companies) in the transportation of passengers taken up at one point in the state and transported wholly within the state to another point therein.'"[77] But what the opinion in that case said of the statute was that "*its terms* apply strictly," etc.[78] Clearly both the Adams Case and the Allen Case were decided on the theory that any economic burden imposed by the taxes on interstate commerce was immaterial, so long as the company was free to abandon the local business. Very likely the taxes might have been sustained on the theory that the burden on interstate commerce was not sufficiently serious to be controlling. But this was not the theory adopted and applied. Though the Western Union Case and the Pullman Case may not require any overruling of earlier decisions, they plainly mark the abandonment of earlier doctrines. Notwithstanding the differences of opinion among the judges who constituted the majority of the court, the Western Union Case and the Pullman Case clearly decide that a tax on the right of a foreign corporation to do local business may by reason of its economic effect on interstate commerce be a regulation of that commerce. With the establishment of this doctrine, the court is compelled to consider the economic effect on interstate commerce of every tax complained of.[79] But neither in the Western Union Case nor in the Pullman Case was it inquired whether the specific amount of the tax in question was disproportionate to the value of the privilege of doing local business. No reference was made to the amount of local business. The theory of the majority seemed to be that it was unconstitutional to apply the measure of total authorized capital, even though the rate applied to that amount was infinitesimal. The rates specified in the Kansas statute started at one-tenth of one per cent on the first $100,000 and diminished as the capital was larger. The Western Union Company was taxed $20,100 on an authorized

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[76] Note 38, *supra*.

[77] 216 U. S. 1, 44, 30 Sup. Ct. Rep. 190 (1910).

[78] 191 U. S. 171, 180, 24 Sup. Ct. Rep. 39 (1903).

[79] See note [61], *supra*.

capital of $100,000,000. Mr. Justice Holmes remarked in his dissenting opinion:

> "If, after this decision, the state of Kansas, without giving any reason, sees fit simply to prohibit the Western Union Telegraph Company from doing any more local business there, or from doing local business until it has paid $20,100 I shall be curious to see upon what ground that legislation will be assailed." [80]

In the Pullman Case the company was taxed $14,800 on an authorized capital of $74,000,000. In *Ludwig* v. *Western Union Telegraph Co.*,[81] decided at the same term, the company escaped from the payment of $25,050 on its authorized capital of $100,000,000. This case arose under an Arkansas statute which adopted the measure of the authorized capital stock. It would seem that, unless certain measures are to be deemed invalid whatever their economic effect on interstate commerce,[82] the court should in each case consider the rate as well as the measure, should ascertain the value of the local business, and should judge whether the sum actually charged for the privilege of conducting that business is moderate or excessive.

Some of these elements were touched upon in *Atchison, T. & S. F. R. Co.* v. *O'Connor*,[83] which declared invalid a Colorado tax of two cents per $1,000 on the capital stock of a foreign corporation. The decision was unanimous, indicating that all the court accepted the doctrine of the Western Union Case as definitely established. Mr. Justice Holmes, who wrote the opinion, referred to the fact that the greater part of the property and business of the Kansas corporation seeking to escape from the Colorado tax "is outside the state of Colorado, and of the business done within the state but a small proportion is local, the greater part being commerce among the states." [84]

In *Baltic Mining Co.* v. *Massachusetts*,[85] decided in 1913, the nature of the business and the amount of the tax receive more

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[80] 216 U. S. 1, 54–55, 30 Sup. Ct. Rep. 190 (1910).

[81] 216 U. S. 146, 30 Sup. Ct. Rep. 280 (1910).

[82] This appears to be the conclusion of the Supreme Court with reference to the measure of total capital stock, with no maximum limitation where applied to taxes on foreign corporation. See pages 600–618, *infra*.

[83] 223 U. S. 280, 32 Sup. Ct. Rep. 216 (1912).

[84] 223 U. S. 280, 285, 32 Sup. Ct. Rep. 216 (1912).

[85] 231 U. S. 68, 34 Sup. Ct. Rep. 15 (1913).

specific consideration. In that case an excise tax measured by the total authorized capital, with a proviso that the annual imposition should not exceed $2,000, was held not to be a burden on interstate commerce when applied to the two corporations whose rights were there in question. One of these corporations was the Baltic Mining Company, which had no property in the state except current bank deposits and a certificate for $80,000 in the stock of another corporation. The other corporation, the S. S. White Dental Company, had in the state no real estate except a leasehold interest; it did no manufacturing in the state; its only property in the state consisted of about $100,000 in stock, fixtures, and bank deposits. In the case of each of these corporations, the authorized capital by which the tax was measured was only one-fifth, or thereabouts, of their entire assets. Mr. Justice Day, who wrote the opinion, stated that the court had no disposition to limit the authority of the Western Union Case or the Pullman Case, but added that "every case involving the validity of a tax must be decided on its own facts," [86] and that therefore "the facts upon which these cases were decided must not be lost sight of in deciding other and alleged similar cases." [87] He then proceeded to point out the differences between the Kansas and Massachusetts statutes [88] and between the business of the complainants and that of the objectors in the Kansas cases.[89] After considering these differences he said:

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[86] 231 U. S. 68, 85, 34 Sup. Ct. Rep. 15 (1913).

[87] *Ibid.*

[88] In addition to the difference due to the fixing of a $2,000 maximum in the Massachusetts statute, Mr. Justice Day refers to the fact that the authorized capital of the two corporations subjected to the Massachusetts tax is in each case about one-fifth of their total assets. 231 U. S. 68, 87, 34 Sup. Ct. Rep. 15 (1913).

[89] "In the Kansas cases the business of both complaining companies was commerce, the same instrumentalities and the same agencies carrying on in the same places the business of the companies of state and interstate character. In the Western U. Tel. Co. Case, the company had a large amount of property permanently located within the state, and between 800 and 900 offices constantly carrying on both state and interstate business. The Pullman Company had been running a large number of cars within the state, in state and interstate business, for many years. There was no attempt to separate the intra-state business from the interstate business by the limitations of state lines in its prosecution." 231 U. S. 68, 85–86, 34 Sup. Ct. Rep. 15 (1913).

"In the cases at bar the business for which the companies are chartered is not, of itself, commerce. True it is that their products are sold and shipped in interstate commerce, and to that extent they are engaged in the business of carrying on interstate commerce, and are entitled to the protection of the Federal Constitution against

"The conclusion, therefore, that the authorized capital is only used as the measure of the tax, in itself lawful, without the necessary effect of burdening interstate commerce, brings the legislation within the authority of the state. So, if the tax is, as we hold it to be, levied upon a legitimate subject of such taxation, it is not void because imposed upon property beyond the state's jurisdiction, for the property itself is not taxed. In so far as it is represented in the authorized capital stock, it is only used as a measure of taxation, and, as we have seen, such measure may be found in property or in the receipts from property not in themselves taxable." [90]

Thus it appears that a state may still measure taxes on lawful subjects by receipts or capital stock which it cannot tax directly. But of course a significant feature of the Massachusetts statute was the provision that the tax should in no event exceed $2,000. Chief Justice White, and Justices Van Devanter and Pitney, dissented from the decision, but without filing an opinion.

After the decisions in *Western Union Telegraph Co.* v. *Kansas* [91] and *Ludwig* v. *Western Union Telegraph Co.*,[92] Kansas and Arkansas changed their statutes. The Kansas statute with respect to foreign corporations, as interpreted by the state court, referred, for the measure of the tax, only to that proportion of the total paid-up capital stock which was represented by property in Kansas employed in purely local business. It also limited the annual imposition to $2,500. In *Lusk* v. *Botkin*,[93] a tax of this amount on a foreign railway company doing business in Kansas was sustained. The Arkansas statute was similar, except that there was no maximum limit to the tax that might be charged. In *St. Louis S. W. Ry. Co.* v. *Arkansas* [94] this statute was sustained and a tax of

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laws burdening commerce of that character. Interstate commerce of all kinds is within the protection of the Constitution of the United States, and it is not within the authority of a state to tax it by burdensome laws. From the statement of facts it is apparent, however, that each of the corporations in question is carrying on a purely local and domestic business, quite separate from its interstate transactions. That local and domestic business, for the privilege of doing which the state has imposed a tax, is real and substantial, and not so connected with interstate commerce as to render a tax upon it a burden upon the interstate business of the companies involved." 231 U. S. 68, 86, 34 Sup. Ct. Rep. 15 (1913).

[90] 231 U. S. 68, 87, 34 Sup. Ct. Rep. 15 (1913).

[91] Note 43, *supra*.

[92] Note 81, *supra*.

[93] 240 U. S. 236, 36 Sup. Ct. Rep. 263 (1916).

[94] 235 U. S. 350, 35 Sup. Ct. Rep. 99 (1914).

$6798.26 imposed on a foreign corporation whose property owned and used in the state for intra-state business was valued at $13,586,-520. These two cases would seem to indicate that the Massachusetts statute involved in the Baltic Case might also be applied to a foreign railroad company. The court might, however, draw a distinction between the cases and hold that, in spite of a provision for a maximum, a tax which refers for a measure to total capital stock cannot be applied to a corporation engaged in transportation, and using the same facilities for local and interstate business in such a manner that the abandonment of local business would not proportionately decrease operating costs. Whether, in such a case, the provision for a maximum would remove the difficulty inherent in selecting the total capital stock as a measure ought in common sense to depend on the maximum set. It would certainly be going far to say that a tax of $2,000 on the right of a foreign railroad corporation to do local business was invalid, merely because the total capital was taken as a basis for determining the exact amount of any levy of less than $2,000.[95]

On the same day that *Lusk* v. *Botkin* [96] was decided, the Supreme Court, in *Kansas City, F. S. & M. R. Co.* v. *Botkin*,[97] held applicable to a railroad corporation chartered in the state of Kansas a Kansas statute, imposing on the privilege of being a corporation a fee which was graduated according to the amount of paid-up capital stock, with a proviso that the maximum should be $2,500. Thus it appeared that, so far at least as domestic corporations are concerned, the selection of total capital stock as a measure is cured by a provision for a reasonable maximum, even though the corporation is engaged in transportation. The opinion left the reader in doubt as to the importance of the provision for a maximum. It seemed to assume that the doctrine of *Western Union Telegraph Co.* v. *Kansas* [98] applies to taxes on the franchises of domestic corporations. Its silence on this point might be taken to obliterate the distinction between taxes on domestic corporations and those on foreign corporations, which was relied on by Mr. Justice White to exclude the issue in *Pullman Co.* v. *Kansas*,[99] from the prece-

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[95] But see Albert Pick & Co. *v.* Jordan, 169 Cal. 1, 16–17, 20, 145 Pac. 506 (1915).

[96] Note 93, *supra.*

[97] 240 U. S. 227, 36 Sup. Ct. Rep. 261 (1916).

[98] Note 43, *supra.*

[99] Note 44, *supra.*

dents in favor of the right of the state to tax domestic corporations as it pleases. The weakness of that distinction was convincingly demonstrated by Mr. Justice Holmes. But at the time it saved Mr. Justice White from direct repudiation of his opinion in *Ashley* v. *Ryan*.[100]

It was not necessary in *Kansas City, F. S. & M. R. Co.* v. *Botkin*[101] either to repudiate or affirm the broad doctrine, formerly prevailing, that the complete power of the state to refuse the privilege of incorporation necessarily sanctions any tax that the state might choose to levy on the enjoyment of the privileges granted, and the opinion of Mr. Justice Hughes is careful to do neither. It says only that a state tax on this privilege "is not necessarily invalid because it is measured by capital stock which in part may represent property not subject to the state's taxing power." [102] The learned justice, however, took pains to show that the reason for the decision was the special circumstances and characteristics of the special case:

> "In the present case, the tax is not laid upon transactions in interstate commerce, or upon receipts from interstate commerce either separately or intermingled with other receipts. It does not fluctuate with the volume of interstate business. It is not a tax imposed for the privilege of doing an interstate business. It is a franchise tax — on the privilege granted by the state of being a corporation — and while it is graduated according to the amount of paid-up capital stock the maximum charge is \$2,500 in the case of all corporations having a paid-up capital of \$5,000,000 or more. This is the amount imposed in the present case where the corporation has a capital of \$31,660,000. We find no ground for saying that a tax of this character, thus limited, is in any sense a tax imposed upon interstate commerce." [103]

Clearly, after this opinion, any state court would be in grave doubt as to the proper decision in a case involving a tax on the franchise of a domestic railroad corporation engaged in interstate commerce, if the tax was measured by total capital stock with no maximum limitation. The opinion of Mr. Justice Harlan in the Western Union Case proceeded on a theory which would be equally

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[100] See pages 580–81, 591–92 *supra*.

[101] Note 97, *supra*.

[102] 240 U. S. 227, 232, 30 Sup. Ct. Rep. 261 (1916).

[103] 240 U. S. 227, 235, 30 Sup. Ct. Rep. 261 (1916).

applicable to domestic corporations. A *dictum* declared plainly enough that a domestic corporation engaged in selling merchandise to purchasers in other states could not be subjected to a tax measured by its total receipts as a condition of doing local business.[104] But Mr. Justice White's opinion proceeded on grounds applicable only to foreign corporations, and without his concurrence, the majority would have been a minority. Yet Mr. Justice White also stated that he "did not dissent from the fundamental application which the court made of the commerce clause of the Constitution." [105] His statement of the special grounds on which he concurred might have been regarded as prompted mainly by a desire not to be guilty of inconsistency with his previous position in *Ashley* v. *Ryan*.[106] The difficulty of knowing the precise extent of the new law which the Supreme Court made in the Western Union Case will be apparent when we come to consider the confusion engendered in some of the state courts during the transition period.

So far, however, as the taxation of domestic corporations is concerned, the Supreme Court has largely cleared up the doubts raised by *Kansas City, F. S. & M. R. Co.* v. *Botkin*.[107] For in *Kansas City, M. & B. R. Co.* v. *Stiles*, [108] which is the latest [109] case on the subject, an annual excise measured by total capital stock was exacted from a domestic railroad corporation engaged in transportation between different states. This domestic corporation was created by a consolidation of other corporations under the very statute which imposed the annual excise. As Mr. Justice Day says in the opinion:

> "The railroads comprising this consolidation entered upon it with the Alabama statute before them and under its conditions, and, subject to constitutional objections as to its enforcement, they cannot be heard to complain of the terms under which they voluntarily invoked and received the grant of corporate existence from the state of Alabama." [110]

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[104] Note 71, *supra*.

[105] 216 U. S. 56, 64, 30 Sup. Ct. Rep. 232 (1910). See also statement enoted on page 590, *supra*, cited in note 70, *supra*.

[106] Note 33, *supra*. See also page 580–581, *supra*.

[107] Note 97, *supra*.

[108] 242 U. S. 111, 37 Sup. Ct. Rep. 56 (1916).

[109] See note [61], *supra*.

[110] 242 U. S. 111, 117, 37 Sup. Ct. Rep. 56 (1916).

For authority for its position the opinion goes back to *Ashley* v. *Ryan*,[111] thus implying that that case was not shaken by the Western Union Case. It is also said that the objections of the complainant "were so recently discussed, and the previous cases in this court considered in *Kansas City, Ft. S. & M. R. Co.* v. *Botkin*, 240 U. S., 60 Law. Ed. 617, 36 Sup. Ct. Rep. 261, that it would be superfluous to undertake extended discussion of the subject now." [112]

"In that case, after a full review of the previous decisions in this court, it was held that each case must depend upon its own circumstances, and that while the state could not tax property beyond its borders, it might measure a tax within its authority by capital stock which in part represented property without the taxing power of the state. As to the objection based upon the due-process clause of the Constitution, we think that principle controlling here. There is no attempt in this case to levy a property tax; a franchise tax within the authority of the state is in part measured by the capital stock representing property owned in other states." [113]

It is true that the case cited said that each case must depend upon its own circumstances. But one of the circumstances in that case was that the annual imposition was limited to $2,500, however large the capital of the corporation. That circumstance was absent in the Louisville Case. But there was present in the Louisville Case the circumstance that the statute complained of was on the books when incorporation was sought and obtained. So it still remains to be settled by explicit decision that excises on domestic corporations previously chartered may be measured by any method that the state chooses to adopt. The remaining question still left open by the decisions of the Supreme Court is whether taxes on foreign corporations engaged in combined interstate and intra-state commerce, other than some form of transportation using the same facilities for both kinds of commerce, may be measured by total capital stock with no limitation as to the amount to be paid.

Since the foregoing sentence was written and in the hands of the printer, the question thus left open by previous decisions has been answered. On December 10, 1917, the Supreme Court

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[111] Note 33, *supra*.

[112] 242 U. S. 111, 118, 37 Sup. Ct. Rep. 56 (1916).

[113] *Ibid.*

decided *Looney* v. *Crane Co.*,[114] and declared invalid a Texas statute, imposing a franchise tax on foreign corporations, which was measured by total capital stock plus surplus and undivided profits. The opinion was by Chief Justice White. It seems to take the position that no foreign corporation engaged in combined domestic and interstate commerce within a state may be subjected to any tax as the price of the privilege of engaging in domestic commerce that would not be proper independently of the enjoyment of such privilege. There is no discussion of the economic effect on interstate business of withdrawal from local business. The opinion relies on "general principles" previously laid down in the Western Union Case [115] and the O'Connor Case.[116] The economic integration of local and interstate transportation which was adverted to and seemingly relied on in those cases is absent in the Looney Case, for the complaining corporation was a foreign manufacturing concern. Its total assets in Texas, consisting of money, merchandise, and two warehouses, were assessed at $301,179. Its total paid-up capital was $17,000,000, and its surplus and undivided profits were $8,129,000. Its gross receipts for the year 1913 were $39,831,000, "of which only $1,019,750 had any relation to the State of Texas and nearly one-half of this amount was the result of transactions purely of an interstate commerce character arising from the sale and shipment of goods from other states to purchasers in Texas who ordered them and from the shipment from Texas to other states for the purpose of filling orders sent from such states." [117]

The facts above given are stated in the opinion of the Chief Justice before the discussion of the constitutional question, but are not again mentioned. All questions of degree are explicitly dismissed from consideration. The Baltic Case [118] and others [119] relied on by the state are said to sustain in no way "the assumption

[114] Number 16, October Term, 1917; 38 Sup. Ct. Rep. 85 (1917). The decision was unanimous, but the fact that it was not reached without some difficulties may perhaps be inferred from the fact that the case was first argued on May 3, 1916, and restored to the docket for reargument May 2, 1917. It was reargued on November 6, 1917, and decided December 10, 1917.

[115] Note 43, *supra*.

[116] Note 83, *supra*.

[117] 245 U. S. —, 38 Sup. Ct. Rep. 85, 86 (1917).

[118] Note 85, *supra*.

[119] Cases cited in notes 94, 97, and 108, *supra*.

that because a violation of the Constitution was not a large one, it would be sanctioned, or that a mere opinion as to the degree of wrong which would arise if the Constitution were violated was treated as affording a measure of the duty of enforcing the Constitution." [120] If the attorneys for the state made and relied on any such assumption, they were unwise. Of course, if a statute violates the Constitution, it violates it. The excuse that the violation is "such a little one" cannot be entertained. But there may well have been more merit in the claim on behalf of the state than the fashion in which it was dismissed would indicate. If the effect on interstate commerce of a state tax on the privilege of doing local business is but slight, this may well warrant a decision that the tax does not "regulate" interstate commerce, but merely "incidentally affects" it. This is a familiar distinction applied in passing judgment upon state exercises of the police power which bear in some measure on interstate commerce. As Mr. Justice Holmes said in dealing with a somewhat analogous problem involving a state tax measured by receipts:

"We are to look for a practical rather than a logical or philosophical distinction. . . . A practical line can be drawn by taking the whole scheme of taxation into account. This must be done by this court as best it may. Neither the state courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect. If it bears upon commerce among the states so directly as to amount to a regulation in a relatively immediate way, it will not be saved by name or form." [121]

The fact that Mr. Justice Holmes himself declined to adopt this kind of reasoning in the Western Union Case is occasion for surprise. The further fact that Chief Justice White, who did follow such lines of thought in the Western Union Case, now abandons them in *Looney* v. *Crane Co.*,[122] is also to be wondered at. The bridge which he built to escape from the force of earlier decisions seems to be wrecked after the crossing is safely made. Possibly this statement needs some qualification, for there is a reference in the opinion to "controlling decisions dealing with cases in substance

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[120] 245 U. S. —, 38 Sup. Ct. Rep. 85, 88 (1917).

[121] Galveston, H. & S. A. R. Co. *v.* Texas, note 41, *supra*, page 227.

[122] Note 114, *supra*.

identical in fact and principle with the case here presented."[123] By this the Chief Justice possibly means to imply that the difference between the business involved in the cases dealing with railroads, parlor-car companies, and telegraph companies, and that of the Crane Company in the principal case, is from a practical and economic standpoint immaterial. But the point is of enough importance to be more explicitly treated. If the Chief Justice intended to make it, he nevertheless used other language which, taken alone, would smother it.

In addition to the franchise tax imposed by Texas, there was involved in the Looney Case a "permit" tax, based on total capital stock exclusive of surplus and undivided profits. The permit tax in force in Texas prior to 1907 was also based on capital stock, but there was a provision that no more than $200 should be charged for a ten-year permit, no matter how large the capital stock of the corporation seeking it. The Act of 1907 removed the limitation, so that the Crane Company would be compelled in 1915 to pay $17,040 for the renewal of the ten-year permit, for which in 1905 it paid only $200. Both the permit tax and the franchise tax were enjoined. They were resisted in reliance on the equal-protection clause, as well as on the due-process and commerce clauses, but the opinion of the court neglects the equal-protection clause, because it holds that both the commerce clause and the due-process clause render the complainant immune from the demands of the state. The central theme of the opinion is as follows:

"It may not be doubted under the case stated that intrinsically and inherently considered both the permit tax and the tax denominated as a franchise tax were direct burdens on interstate commerce and moreover exerted the taxing authority of the State over property and rights which were wholly beyond the confines of the State and not subject to its jurisdiction and therefore constituted a taking without due process. It is also clear, however, that both the permit tax and the franchise tax exerted a power which the State undoubtedly possessed, that is, the authority to control the doing of business within the State by a foreign corporation and the right to tax the intra-state business of such corporation carried on as a result of permission to come in. The sole contention, then, upon which the acts can be sustained is that although they exerted

[123] 245 U. S. —, 38 Sup. Ct. Rep. 85, 87 (1917).

a power which could not be called into play consistently with the Constitution of the United States, they were yet valid because they also exercised an intrinsically local power. But this view can only be sustained upon the assumption that the limitations of the Constitution of the United States are not paramount but are subordinate to and may be set aside by state authority as the result of the exertion of a local power. In substance, therefore, the proposition must rest upon the theory that our dual system of government has no existence because the exertion of the lawful powers of the one involves the negation or destruction of the rightful authority of the other. But original discussion is unnecessary since to state the proposition is to demonstrate its want of foundation and because the fundamental error upon which it rests has been conclusively established." [124]

Needless to say, the proposition would not be so stated except by one who wished to demonstrate its want of foundation. It was not so stated by Mr. Justice Holmes in his dissent in the Western Union and Pullman cases. It was not so stated by Mr. Justice Day in *Kansas City, M. & B. R. Co.* v. *Stiles*,[125] which sustained a tax on a consolidation of domestic corporations engaged in local and interstate transportation, although the tax was measured by the total capital stock, with no provision for a maximum. Every word of Chief Justice White's opinion above quoted might be applied with equal logic to the taxes on domestic corporations, measured by total capital stock. Yet the Chief Justice agrees that such taxation is proper. If a different decision in the Looney Case would deny the existence of the federal system, so does the actual decision of the Stiles Case from which the Chief Justice does not dissent; for the tax in that case was "intrinsically and inherently" beyond the power of the state, if this means that, but for the fact that the subject taxed was a privilege granted by the state, the tax could not be imposed.

The issue in these cases is not to be solved by the logic of the Absolute. Mr. Justice Holmes tried it in his dissent in the Western Union and Pullman cases. Since the state may deny the privilege, he says, it may burden it as it pleases, even though it also burdens interstate commerce. And now the Chief Justice, in similar absolutistic vein, says that, if the tax is intrinsically on interstate commerce, it does not matter that it is also on something else

[124] 245 U. S. —, 38 Sup. Ct. Rep. 85, 87 (1917).
[125] Note 108, *supra*.

which is within the authority of the state. It looks like a dilemma, and it is, so far as any inexorable logic is concerned. The problem of a dilemma cannot be solved by competing asseveration. It is a question of more or less. We can find an illuminating guide to the way out of the difficulty, by appealing from Mr. Justice Holmes in the Western Union Case to Mr. Justice Holmes in *Hudson County Water Co.* v. *McCarter*.[126] In his opinion in that case he tells us:

"All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached. . . . The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points along the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side. . . . It constantly is necessary to reconcile and adjust different constitutional principles, each of which would be entitled to possession of the disputed ground but for the presence of the others." [127]

It is a constitutional principle that a state may not impose taxes on interstate commerce. It is another constitutional principle that a state may impose taxes on the privilege granted to a foreign corporation to carry on local business within the state. The taxes involved in the Western Union Case and in the Looney Case were on such a privilege. They were also on interstate commerce. They come within both constitutional principles. One would declare them valid; the other, invalid. One or the other must yield, for the taxes cannot be both valid and invalid. With respect to such taxes on the privilege of being a domestic corporation, Chief Justice White agrees that the commerce clause must yield. With respect to similar taxes on foreign corporations, he insists that the commerce clause must prevail, or else "the limitations of the Constitution of the United States are not paramount." If either case stood alone, it would be simpler than when the two are found side by side, and both by a unanimous court.

The situation is one that cannot be solved by a formula, as Mr. Justice Holmes has told us. Nevertheless in his dissenting opinion in the Western Union Case he made use of a formula

[126] 209 U. S. 349, 28 Sup. Ct. Rep. 529 (1908).

[127] 209 U. S. 349, 355-357, 28 Sup. Ct. Rep. 529 (1908).

which he seemed to regard as convincing. "It does not matter," he says, "if the sum [imposed by the State] is extravagant. Even in the law the whole generally includes its parts. If the state may prohibit, it may prohibit with the privilege of avoiding the prohibition in a certain way." [128] Thus he implies that complete prohibition of local business is a whole, of which the imposition of heavy burdens for the privilege of conducting such local business is a part. But the relation of whole and parts exists only where we are dealing with units that are commensurable; and the power of imposing heavy burdens is not a part of the power of absolute exclusion, for the two are not commensurable. It might as well be urged that capital punishment is a whole, of which a day's torture is a part, and that, therefore, the government which might put a man to death for treason may impose torture instead. Less of life is taken by brief torture than by death. But the interests affected by torture are not identical with those affected by death. One conflicts with the constitutional prohibition against cruel and unusual punishments, and the other does not. So the interests affected by heavy burdens on corporations doing a combined local and interstate business are different from those affected by excluding the corporation from local business. A state legislature which forbade all foreign corporations to carry passengers on intra-state journeys within the state would soon learn that it had affected interests which had not been touched by measuring a tax on such corporations by their total capital stock. A state is not exercising its power of exclusion when it imposes an excise tax. If necessary, this can be established by a syllogism. And a syllogism would show that the power to exclude does not necessarily carry with it the power to impose heavy burdens,[129] any more than the power of an owner of property to forbid, or to permit, others to use it, carries with it the power to exact any and all conditions whatever of those admitted to its use.

Of course the policy which permits complete exclusion may well permit the exaction of heavy burdens on those admitted. But this is not necessarily true. The interests to be balanced are not the same in both exertions of state authority. And the decision with respect to each should be based on the pros and contras of

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[128] Quoted on page 585, *supra*.

[129] See 16 Col. L. Rev. 99, 110–11.

the particular issue in dispute. The problem is a "practical," rather than a "logical or philosophical," one, if logic and philosophy involve the disregard of practical considerations. According to a modern, mundane school of philosophy, however, logic can stoop to the practical, and wade through a world of particulars making differentiations on the basis of results, rather than of superimposed categories. This school would doubtless rephrase the *dictum* of Mr. Justice Holmes and say that the problem is a "logical," rather than a "metaphysical," one.[130] But the difference would be merely one of nomenclature. Both would agree in general that burdens as the price of admission should be treated differently from exclusion, if the two had substantial differences of result. Mr. Justice Holmes, it is to be observed, implied in his dissent in the Western Union Case that the corporation would abandon its local business if such business did not yield the tax assessed thereon. If he was correct in this, the burden would be no greater than that ensuing from exclusion from such business. But the corporation might, on the other hand, continue the local business and recoup itself for the tax thereon by maintaining or increasing interstate rates, if the Interstate Commerce Commission would permit it. This might be more of a burden on interstate commerce than would follow from exclusion from connected intra-state commerce.

It seems likely, however, that heavy taxation on connected intra-state commerce is no more of a burden on interstate commerce than exclusion from the local business would be. Mr. Justice Holmes is probably correct in insisting that the two exercises of state power should be treated alike. The doctrine of the majority in the Western Union Case really shakes the foundation of the previously declared rule that the state has complete power to exclude from local business a foreign corporation seeking to do a combined local and interstate business. Mr. Justice Holmes seems aware of this when he says in his dissent in the Pullman Case, that

[130] Compare Mr. Justice Bradley, in Philadelphia & Southern Mail S. S. Co. *v.* Pennsylvania, 122 U. S. 326, 336–37, 7 Sup. Ct. Rep. 1118 (1887): "If the state cannot tax the transportation, may it, nevertheless, tax the fares and freights received therefor? Where is the difference? Looking at the substance of things, and not a mere form, it is very difficult to see any difference. The one thing seems to be tantamount to the other. It would seem to be rather metaphysics than plain logic for the state officials to say to the company: 'We will not tax you for the transportation you perform, but we will tax you for what you get for performing it.' Such a position can hardly be said to be based on a sound method of reasoning."

exclusion from local business is not a burden on interstate business, but only the denial of a collateral benefit.[131] He, it would seem, regards local and interstate transportation, not as joint products, but each as a by-product of the other. The contrary view seems in better accord with business sense. It is now established that intra-state rates must fit into the system of interstate rates,[132] because interstate commerce is affected by relatively low intra-state rates. And in *West* v. *Kansas Natural Gas Co.*,[133] Mr. Justice McKenna quoted with approval a statement that "no state can by action or inaction prevent, unreasonably burden, discriminate against, or directly regulate interstate commerce or the right to carry it on." [134] From such a statement it would follow that a state could not refuse to let a corporation carry on intra-state commerce in connection with its interstate commerce, if such refusal unreasonably burdened the interstate commerce. It is to be anticipated that a state, if it actually forbade unconditionally any intra-state commerce which was intimately connected with interstate commerce, would find its power circumscribed as is its power over intra-state rates which affect interstate commerce. Exclusion from local business and burdensome taxation on that business are probably so similar in their effect on economically related interstate commerce that they should be treated alike in deciding whether in substance they constitute "regulations" of interstate commerce. Grant Mr. Justice Holmes' hypothesis, and his conclusion is sensible. But his hypothesis is one that the modern development and integration of certain kinds of commerce require us to scrutinize and probably to abandon.

But this scrutiny should keep close to the turf of fact. It should not be as doctrinaire as the assertion that a tax, if levied on local business, cannot be a regulation of interstate commerce, or the contrary assertion that a tax, if measured by elements of interstate commerce, must necessarily be a regulation of that commerce, even though the subject taxed is local commerce. In form all the state taxes which we have been considering are regulations

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[131] See passage quoted on page 585, *supra*.

[132] Houston, E. & W. T. R. Co. *v.* United States, 234 U. S. 342, 34 Sup. Ct. Rep. 833 (1914); American Express Co. *v.* South Dakota, 244 U. S. 617, 37 Sup. Ct. Rep. 656 (1917).

[133] 221 U. S. 229, 31 Sup. Ct. Rep. 564 (1911).

[134] 221 U. S. 229, 262, 31 Sup. Ct. Rep. 564 (1911).

of something else than interstate commerce. In substance they have all had some effect on interstate commerce. At the beginning the form was regarded as controlling. The reason given for refusing to consider the substance was that the privilege taxed by the state might be surrendered, and the imposition thereby avoided. Later a majority of the court became convinced that in certain kinds of business the abandonment of local business would itself be so substantial a burden on the interstate business as to amount to a "regulation" thereof. Such an abandonment might in a very real sense be a "regulation" of interstate commerce, even though it were to be regarded as the denial of a collateral benefit rather than the imposition of a burden. For in common sense the effective and economical conduct of interstate transportation requires the collateral benefit of uniting local transportation with that between the states. So, also local transportation requires the collateral benefit of interstate transportation. The same roadbed and the same facilities and men are used for both. The physical separation of the two would be an act of folly. To allow a state to require a corporation to choose between such separation and excessive burdens on the local business is to allow it to interfere seriously with the only reasonable method of conducting the interstate business.

It by no means follows, however, that what is true of the transportation business is true of all other businesses. And if the transition which the court made in the Western Union Case was one from form to substance, substance rather than form should be regarded in applying the new doctrine to other businesses than those which inevitably use the same facilities in both local and interstate commerce. But the reasoning of Chief Justice White in the Looney Case is formal rather than substantial. On the one hand, it is conceded that the state is exercising "an intrinsically local power." This is because the subject on which the tax is levied is within the taxing jurisdiction of the state. On the other hand, the tax so levied, "intrinsically and inherently considered," is a direct burden on interstate commerce. This is because it is measured by total capital stock, and therefore depends for its amount on the entire assets and business of the corporation, and not merely on those local to the state. The Chief Justice concludes that it inexorably follows that a tax so measured is an invalid regulation of interstate commerce. All his colleagues concur in

the result and none expresses dissent from the reasoning. Yet the Chief Justice and the same colleagues all agree that a tax on a domestic corporation similarly measured is not a regulation of interstate commerce.[135] On any basis of purely formal reasoning, the two decisions are irreconcilably opposed.[136]

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135 Kansas City, M. & B. R. Co. *v.* Stiles, note 108, *supra.*

136 There may be a practical reason why it is not necessary to circumscribe the power of a state in its taxation of the franchises of domestic corporations engaged in interstate commerce. If the tax becomes unduly burdensome, the corporation may surrender its state charter and obtain a federal charter. Congress, under the power to establish post offices and post roads, and the further power to make all necessary and proper laws for carrying into effect the postal power, may charter a corporation to engage in intra-state, as well as in interstate, transportation. Such a franchise would be immune from state taxation. California *v.* Central Pacific Railroad Co., 127 U. S. 1, 8 Sup. Ct. Rep. 1073 (1888). See note 171, page 371, *supra.* See also Lindsay Rogers, The Postal Power of Congress (Baltimore, 10, 91–96, 150–57.

Now that the federal government has taken over the control and management of the railroads under the war power, and under the terms proposed at this writing (January 7, 1918), will pay to the roads guaranteed dividends on the stock, and will therefore be affected financially by all state taxes on the property and franchises and intra-state business of the roads, interesting and important questions are raised with respect to the power of the states to impose without the consent of Congress any taxes which affect the net income from operation and management. From an economic standpoint the fact that the roads are still privately owned is unimportant, if the government is to pay what amounts to a rental determined by dividends in past years. A state tax on intra-state receipts will come out of the United States government. Could such a tax be imposed without the consent of Congress? It is clear that no state could tax receipts derived from business for the government. Western Union Telegraph Co. *v.* Texas, 105 U. S. 460 (1881). But does this rule now apply to all the business done? South Carolina *v.* United States, 199 U. S. 437, 26 Sup. Ct. Rep. 110 (1905), establishes that the federal government may tax business of a private nature conducted by a state. It does not follow, however, that a similar doctrine will be applied to state taxation of private business conducted by the United States government; for, though the state cannot tax franchises granted by the United States, California *v.* Central Pacific Railroad Co., *supra,* the United States can tax franchises granted by the state, or, what is the same in effect, the doing of business by virtue of such franchises. Flint *v.* Stone Tracy Co., 220 U. S. 107, 31 Sup. Ct. Rep. 342 (1911). Furthermore, in Van Brocklin *v.* Tennessee, 117 U. S. 151, 6 Sup. Ct. Rep. 670 (1886), it was declared by Mr. Justice Gray that "The United States does not and cannot hold property, as a monarch may, for private or personal purposes." But this was nearly twenty years before the South Carolina Case, and things have moved since then. One who was not timid about making prophecies might feel fairly safe in venturing to predict that the Supreme Court would not withdraw from the taxing powers of the states, the local and private business done by the railroads under government operation, unless Congress should expressly prescribe otherwise.

Since it is held that a state tax on property may be measured by receipts from interstate commerce, United States Express Co. *v.* Minnesota, 223 U. S. 335, 32 Sup.

This return to scholasticism after the realistic attitude adopted in the Western Union Case is disappointing, especially to one who had previously completed for incorporation in this article a discussion of state decisions subsequent to the Western Union Case, which discussion had as its keynote the statement that "the Supreme Court has abandoned the test of artificial legal distinctions for the test of practical results," and the further statement that "whether any tax on domestic business burdens interstate commerce depends of course on the effect on interstate commerce of abandoning the local business." In this unpublished discussion the opinion was ventured that the Supreme Court might, in dealing with taxes on corporations not engaged in transportation, "regard the actual burden imposed by any tax on interstate commerce," and therefore "take account of the rate of levy as well

Ct. Rep. 211 (1912), and that property privately owned, but employed in work for the federal government, is not exempt from state taxation, Baltimore Shipbuilding Co. *v.* Baltimore, 195 U. S. 375, 25 Sup. Ct. Rep. 50 (1904), and Gromer *v.* Standard Dredging Co., 224 U. S. 362, 32 Sup. Ct. Rep. 499 (1912), it seems likely that the existing state taxes on the property of the railroads would not be affected by their transition to governmental control. If a state tax on property may be measured by receipts from interstate commerce, it would seem that it might also be measured by receipts from the federal government, under the doctrine of Home Insurance Co. *v.* New York, note 31, *supra*. See 31 HARV. L. REV. 321, 334–35. Of course the theory of the opinion in Looney *v.* Crane Co., note 114, *supra*, would require the overruling of the Home Insurance Case, since the most recent pronouncement of the Supreme Court takes the position that the states cannot use their lawful powers in ways that resemble too closely the use of unlawful powers, and that, therefore, they cannot measure taxes on proper subjects by elements that cannot be taxed directly. But no case has as yet applied this doctrine to state taxes which are indirect encroachments on federal instrumentalities.

The Home Insurance Case would by inference authorize the states to measure taxes on corporate franchises by receipts from the United States government. But later cases under the commerce clause forbid measuring state taxes on privileges of foreign corporations by total capital stock, though taxes on domestic franchises may be so measured. From these decisions, except for the doubts engendered by the opinion in the Looney Case, we might assume that state taxes on the franchises of domestic corporations operating railroads will not be affected by the federal control of the roads. As to state taxes on privileges of foreign corporations engaged in transportation, and now managed by the federal government, the answer to the question, whether they can be measured by receipts from the United States, would depend upon whether the court will regard the measure of receipts as vicious as the measure of total capital stock, and of course upon the general question whether, since the new enterprise of the national government is essentially private and pecuniary as distinguished from governmental, the doctrine of the South Carolina Case will apply. At any rate, Congress should by specific legislation prevent all these troublesome questions from arising.

as the measure to which that rate is applied." But the opinion of the Chief Justice in *Looney* v. *Crane Co.*[137] seems to give a death blow to those prophecies. It indicates that no longer does each case depend upon its own circumstances, as previous decisions of the court had declared.[138]

There is of course a distinct advantage in declaring that the measure of total capital stock, with no provision for a maximum, cannot be applied to an excise on a foreign corporation engaged in any kind of interstate commerce in connection with its local business. Such a measure has vicious potentialities, and it may be well to outlaw it, even when it is kept in leash by an infinitesimal rate of levy. Such outlawry will relieve the court from considering in each case the ratio between the local business and the total business of the corporation, and from determining whether the sum exacted by the application of the measure is out of proportion to the value of the privilege of conducting local business. The court will still have to consider such questions in determining whether the maximum provision in such statutes as that applied in the Baltic Case is sufficiently low. Corporations with little capital might prefer a low rate applied to total capital, with no maximum, to a higher rate applied to total capital, with a maximum which would not affect the amount exacted of them. The Supreme Court may be pardoned for a desire to get back to some broad general rules, after the confusion engendered by its distinction between the Western Union Case and the Baltic Case. Yet the references to the business of the complainants in the Baltic Case, and to the excess of their actual assets over their authorized capital, warrant the belief that the court in that case did not mean to declare that a $2,000 maximum rendered completely innocuous the measure of total capital stock, so that the Massachusetts statute was necessarily applicable to every foreign corporation. If Massachusetts should increase its rate of levy, the provision that the tax should not exceed $2,000 might not be sufficient to save it from burdening the interstate commerce carried on by corporations with a small capital stock. So that even after the Looney Case, it may be impossible for the court to avoid the consideration of the details and size of the business of a foreign cor-

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[137] Note 114, *supra*.

[138] See quotations to this effect, on pages 595, 598, 600, *supra*.

poration subjected to an excise tax, measured by total capital stock, but limited in amount. So long as the court gives weight to such considerations, it may apply the statute to some corporations and decline to apply it to others. It is by no means certain that such formal reasoning as was applied in the Looney Case will be applied to future cases on the subject under consideration. The reasoning in a judicial opinion reflects primarily the attitude of the particular judge who writes it. So long as his colleagues are satisfied with the disposition of the case, they may be disinclined to express disagreement with the opinion, merely because it may strike some contributor to a legal periodical as tending to formalism, where formalism is thought undesirable.

It cannot be gainsaid that there is wholesome sense in forbidding a state to measure any excise tax by property or business without the state. The opinion in the Looney Case, by invoking the due-process clause as well as the commerce clause, indicates that a tax on foreign corporations engaged solely in domestic business cannot be measured by total capital stock. This doctrine would overrule *Horn Silver Mining Co.* v. *New York*.[139] Such an intention on the part of the Supreme Court is, however, not to be safely inferred, since the due-process clause may be used in the Looney Case merely as a flying buttress to support the wall erected on the foundations of the commerce clause. But the law on the taxation of foreign corporations has shown itself to be far from rigid since 1910, and prophecies are dangerous, as the plight of one who wrote before the Looney Case demonstrates.

A consideration of Chief Justice White's discussion of earlier cases may lead to the conclusion that he does not abandon practical considerations so completely as some of his language in the Looney Case suggests. But his use of the practical is for the purpose of differentiating the cases adduced on behalf of the state. Of the Western Union Case and those following it which sustained objections of the taxpayers,[140] he says that they

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[139] 143 U. S. 305, 12 Sup. Ct. Rep. 403 (1892). See also Philadelphia Fire Ass'n *v.* New York, 119 U. S. 110, 7 Sup. Ct. Rep. 108 (1886).

[140] These are the cases cited in notes 43, 44, 81, and 83, *supra*, and International Textbook Co. *v.* Pigg, 217 U. S. 91, 30 Sup. Ct. Rep. 481 (1910). The Pigg Case involved a statute requiring all foreign corporations, as a prerequisite to bringing suit in the courts of the state, to file with the secretary of state a statement of their financial condition, etc. The case held that the statute could not be applied to

"were concerned in various forms with the identical questions here involved and authoritatively settled that the states are without power to use their lawful authority to exclude foreign corporations by directly burdening interstate commerce as a condition of permitting them to do business in the state in violation of the Constitution, or because of the right to exclude, to exert the power to tax the property of the corporation and its activities outside of and beyond the jurisdiction of the state in disregard, not only of the commerce clause, but of the due process clause of the Fourteenth Amendment." [141]

This is true, in so far as the general principle is concerned. But the cases involved, not only the general principle, but the application of it to the facts of each case. Those facts included the character of the complainant's business [142] as well as the measure of the tax. The questions involved in the earlier cases are not identical with those involved in the Looney Case, unless the businesses in all the cases are identical. This point the Chief Justice overlooks. This is apparent from the following quotation from his opinion:

"The dominancy of these adjudications is plainly shown by the fact that as a result of the decision in the leading case (*Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1, 30 Sup. Ct. 190, 54 L. Ed. 355) the Supreme Court of the state of Texas, recognizing the repugnancy of the permit tax law here in question to the Constitution of the United States, enjoined its enforcement (*Western Union Telegraph Co.* v. *State*, 103 Tex. 306, 126 S. W. 1197), . . ." [143]

But that Texas decision involved the same corporation which succeeded in escaping from the Kansas statute in the Western Union Case. The Texas decision was rendered less than three months after that of the Supreme Court,[144] and three years before the

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foreign corporations engaged in interstate commerce, and that the correspondence school whose rights were in issue was engaged in such commerce.

[141] 245 U. S. —, 38 Sup. Ct. Rep. 85, 87 (1917).

[142] Note the emphasis on this point by Mr. Justice White in the passage quoted on page 587, *supra*, and by Mr. Justice Harlan in the passage quoted on pages 590-91, *supra*.

[143] 245 U. S. —, 38 Sup. Ct. Rep. 85, 87 (1917).

[144] The full opinion of the Texas supreme court, by Mr. Chief Justice Gaines, was as follows:

"Since this suit was brought to this court, the Supreme Court of the United States in the case of Western Union Telegraph Co. *v.* The State of Kansas, has ruled that a similar law of Kansas was unconstitutional. This renders unnecessary any dis-

decision in the Baltic Case,[145] which involved a business like that of the complainant in the Looney Case, and not like that of the Western Union Telegraph Company.

In the Looney Case, the state naturally sought to sustain the tax on the authority of the Baltic Case and those following it, in which the complaining taxpayer was denied relief.[146] But the Chief Justice answers:

"The incongruity of the contention will be manifest when it is observed that not only did the cases relied upon contain nothing expressly purporting to overrule the previous cases, but on the contrary in explicit terms declared that they did not conflict with them and that they proceeded upon conditions peculiar to the particular cases. . . .[147] These conditions related to the subject-matter upon which the tax was levied, or to the amount of taxes in other respects paid by the corporation, or limitations on the amount of the tax authorized when a much larger amount would have been due upon the basis upon which the tax was apparently levied. . . .[148]

"It follows, therefore, that the cases which the argument relies upon do not in any manner qualify the general principles propounded in the previous cases upon which we have rested our conclusion since the later cases rested upon particular provisions in each particular case which it was held caused the general and recognized rule not to be applicable." [149]

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cussion of the question involved in this suit. Upon the authority of the case cited, the judgments of the District Court and of the Court of Civil Appeals are reversed and judgment here rendered for the Western Union Telegraph Company."

[145] Note 85, *supra.*

[146] These are the cases cited in notes 85, 94, 97, and 108, *supra.*

[147] 245 U. S. —, 38 Sup. Ct. Rep. 85, 87 (1917).

[148] 245 U. S. —, 38 Sup. Ct. Rep. 85, 88 (1917).

[149] 245 U. S. —, 38 Sup. Ct. Rep. 85, 88 (1917). In the same paragraph, the Chief Justice also says of the Baltic Case and those following it in which taxes were sustained:

"In the first place it is apparent in each of the cases that as the statutes under consideration were found not to be on their face inherently repugnant either to the commerce or due process clauses of the Constitution, it came to be considered whether by their necessary operation and effect they were repugnant to the Constitution in the particulars stated, and this inquiry it was expressly pointed out was to be governed by the rule long ago announced in Postal Telegraph Cable Co. *v.* Adams, 155 U. S. 688, 698, 15 Sup. Ct. Rep. 268, 270 that 'the substance, and not the shadow determines the validity of the exercise of the power.' In the second place, in making the inquiry stated in all of the cases, the compatibility of the statutes with the Constitution which was found to exist resulted from particular provisions contained in each of them which so qualified and restricted their operation and necessarily so limited their effect as to lead to such results."

From the application of the foregoing language to the Stiles Case, note 108, *supra,*

The general and recognized rule adverted to may be phrased as the rule that the power of the state to tax intra-state commerce, or some privilege granted by the state, does not involve the power to destroy intra-state commerce, if such destruction would substantially burden interstate commerce. But the application of this general rule to any particular case necessitates the inquiry whether the abandonment of intra-state commerce in order to escape the tax, would in fact substantially burden interstate commerce. Previous to the Looney Case, at any rate, there was no *general* rule that a state tax on a proper subject could not be measured by elements which could not be subjected to direct taxation. If there was any *general* rule, it was to the contrary effect.[150] The only recognized exception to this previous general rule was, that a tax on the privilege of a foreign transportation corporation to carry on domestic commerce could not be measured by total capital stock with no maximum limitation. In the Looney Case, a similar exception is established in favor of foreign corporations making both local sales within the state, and also interstate sales within and without the state. But the exceptions now seem to constitute a new "general and recognized rule." Yet to this new rule there are exceptions in favor of excises on domestic corporations, even if engaged in interstate transportation, and in favor of foreign corporations engaged in local sales, if a reasonable limit is set to the annual imposition.

The opinion in the Looney Case is to be criticized for its failure

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a tax on a domestic corporation engaged in interstate as well as intra-state transportation, measured by total capital stock with no maximum limitation, is not on its face inherently repugnant to the Constitution. From its application to the Baltic Case, note 85, *supra*, a tax on a foreign corporation, measured by total capital stock with a maximum limitation of $2,000, is not inherently repugnant to the Constitution, even as applied to corporations engaged in interstate as well as intra-state sales. But the Texas statute under review, by selecting the total capital stock as a measure of a tax on the franchise of a foreign corporation whose business is substantially like that of the S. S. White Dental Company involved in the Baltic Case, makes the tax one which "intrinsically and inherently considered" is a direct burden on interstate commerce, and the exercise of "a power which could not be called into play consistently with the Constitution. . . ."

[150] For recognitions of this rule in opinions of the Supreme Court subsequent to the Western Union Case, see the quotations from the opinion in the Baltic Case on page 596, *supra*, from the opinion in the Stiles Case on page 599, *supra*, and from the opinion in Flint *v.* Stone Tracy Co., 220 U. S. 107, 165, 166, 31 Sup. Ct. Rep. 342 (1911), in note 42 on pages 333–34, *supra*.

to tell us why foreign corporations engaged in the business of making local and interstate sales within the state are excepted from the former general rule, and included in the new general rule, when domestic corporations conducting a combined local and interstate transportation business are not. None of the reasoning in the opinion accounts for this difference of treatment. It would have been well, too, to have pointed out explicitly that the provision for a maximum in the Massachusetts statute applied in the Baltic Case was essential to the decision of that case, and that the fact that the corporations there involved were not engaged in transportation was not alone sufficient to justify measuring an excise on their local business by their total capital stock. For the Massachusetts supreme court assumed the contrary [151] three months before the United States Supreme Court decided the Looney Case. By reverting to "general and recognized rules" the Supreme Court is unnecessarily confusing the state courts, particularly when the Supreme Court recognizes that there are exceptions to these "general" rules, and fails to state specifically why the case at bar does not come within such exceptions.

Though the opinion in the Looney Case is less illuminating than might be desired, the decision establishes that the measure of total capital stock, with no provision for a maximum, is inherently and incurably vicious, when applied to an excise on a foreign corporation manufacturing goods in other states, and making domestic and interstate sales within the state. The reasoning of the opinion would, taken by itself, lead one to infer that the doctrine of the case would apply also to a foreign corporation engaged in local manufacturing and making local and interstate sales within the state.[152] It would lead one to infer that the doctrine would apply to an excise on foreign corporations, measured by any receipts which included receipts from interstate commerce.[153] But the reasoning would lead also to the inference that the doctrine would apply to a domestic corporation and to a tax on the property of a foreign corporation, measured by receipts which include receipts from interstate commerce. We know, however, that the doctrine

[151] International Paper Co. *v.* Commonwealth (Mass.), 117 N. E. 246 (September 13, 1917).

[152] The contrary was held in International Paper Co. *v.* Commonwealth, note 151, *supra*, and Atlas Powder Co. *v.* Goodloe, 131 Tenn. 490, 175 S. W. 547 (1915).

[153] The contrary was held in Baldwin Tool Works *v.* Blue, 240 Fed. 202 (1916).

does not apply to such cases.[154] Therefore we cannot rely for our exposition of the law on the general statements made in the Looney opinion. We must still seek the law in the concrete decisions, and not in the general statements. Of course in this respect the decisions and opinions under review are not peculiar. The vital principle of the law is to be found not in abstract doctrine, but in specific and detailed adjustments of concrete situations.

(*To be continued.*)

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[154] Kansas City, F. S. & B. R. Co. *v.* Stiles, note 108, *supra;* United States Express Co. *v.* Minnesota, 223 U. S. 335, 32 Sup. Ct. Rep. 211 (1912).

INDIRECT ENCROACHMENT ON FEDERAL AUTHORITY BY THE TAXING POWERS OF THE STATES.[1] III

II. Regulations of Interstate Commerce (*continued*)

2. *Taxes not Discriminating against Interstate Commerce* (continued)

A. taxes on privileges (*concluded*)

(*c*) *State Decisions Subsequent to the Western Union Case*

PRIOR to 1910 the states had good grounds for assuming that they might impose such excises as they pleased on the franchises of domestic corporations [2] or on the privileges of foreign corporations to enter the state to carry on domestic commerce.[3] The prevailing judicial thought seemed to be that, since these were privileges that the state might withhold, it therefore followed as the night the day that they were privileges which, when granted, the state might tax as it willed. But in *Western Union Telegraph Co.* v. *Kansas*,[4] the Supreme Court held that Kansas could not require a foreign corporation, doing a combined local and interstate telegraph business within the state, to pay for the privilege of doing local business a fee which was measured by its total capital stock.

Owing to the fact that the judges who composed the majority were not fully agreed on the reasons for the decision, it was difficult to state the exact proposition of law for which the case stood. It was clear, however, that the case cracked the doctrine, previously prevailing, that the power of a state to exclude foreign corporations

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[1] For preceding installments of this discussion, see 31 Harv. L. Rev. 321–72 (January, 1918) and 31 Harv. L. Rev. 572–618 (February, 1918).

[2] State Tax on Railway Gross Receipts, 15 Wall. (82 U. S.) 284 (1872); Delaware Railroad Tax, 18 Wall. (85 U. S.) 206 (1873); Railroad Co. *v.* Maryland, 21 Wall. (88 U. S.) 456 (1874); Ashley *v.* Ryan, 153 U. S. 436, 14 Sup. Ct. Rep. 865 (1894). See 31 Harv. L. Rev. 576–81.

[3] Maine *v.* Grand Trunk Railway Co., 142 U. S. 217, 12 Sup. Ct. Rep. 121 (1891); Pullman Co. *v.* Adams, 189 U. S. 420, 23 Sup. Ct. Rep. 494 (1903); Allen *v.* Pullman's Palace Car Co., 191 U. S. 171, 24 Sup. Ct. Rep. 39 (1903). See 31 Harv. L. Rev. 579–80, 582–83.

[4] 216 U. S. 1, 30 Sup. Ct. Rep. 190 (1910). See 31 Harv. L. Rev. 584–94.

from intra-state commerce within its borders, carried with it absolute discretion in imposing taxes on those admitted to carry on such commerce. It was apparent, too, that the new departure was influenced by the character of the business in which the complaining corporation was engaged. Mr. Justice White, whose opinion proceeded mainly on an application of the due-process clause, stated that "the continued beneficial existence of the investment depends upon the right to use the property . . . for both interstate and local business." [5] If the local business is given up in order to avoid a tax measured by property outside of the state, "the property established for the purpose of doing local business becomes worthless and is in effect confiscated." [6] And Mr. Justice Harlan said that the "state knows that the Telegraph Company, in order to . . . make its telegraphic system effective, must do all kinds of telegraph business." [7]

Later in *Baltic Mining Co.* v. *Massachusetts* [8] Mr. Justice Day observed that in the Kansas cases "the business of both complaining companies was commerce, the same instrumentalities and the same agencies carrying on in the same places the business of the companies of state and interstate character." [9] The Baltic Case involved two corporations each of which was said to be "carrying on a purely local business, quite separate from its interstate transactions." [10] In this case the court sanctioned the imposition of a tax on a foreign corporation for the privilege of conducting local business, which tax, though measured by total capital stock, could not, under the terms of the statute, exceed $2,000. It was impossible to tell from the opinion just what weight the court gave respectively to this provision for a maximum and to the fact that the local business was separate and distinct from the interstate business. But Mr. Justice Day thought it material to mention that the "local and domestic business is real and substantial, and not so connected with interstate commerce as to render a tax upon it a burden upon the interstate business." [11]

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[5] 216 U. S. 1, 50, 30 Sup. Ct. Rep. 190 (1910). See 31 HARV. L. REV. 587.

[6] *Ibid.*

[7] 216 U. S. 1, 37, 30 Sup. Ct. Rep. 190 (1910). See 31 HARV. L. REV. 591.

[8] 231 U. S. 68, 34 Sup. Ct. Rep. 15 (1913). See 31 HARV. L. REV. 594–96.

[9] 231 U. S. 68, 85, 34 Sup. Ct. Rep. 15 (1913). See 31 HARV. L. REV. 595, note 89.

[10] 231 U. S. 68, 86, 34 Sup. Ct. Rep. 15 (1913). See 31 HARV. L. REV. 595–96, note 89.

[11] *Ibid.*

It is to be observed that the learned justice said "*a* tax," and did not restrict his comment to the particular tax in question. Hence, after the Baltic Case, a state had considerable warrant for the inference that taxes on the local business of foreign corporations might be measured by their total capital stock, if the local business was of a kind that might be easily separated from the interstate business, and was not, like the railroad and telegraph business, so tied up with the interstate business by joint use of the same physical facilities that the abandonment of the local business would not proportionately reduce operating costs. But since, in addition to the difference between the business involved in the Massachusetts case and that involved in the Kansas case, there was the further difference in the statutes with respect to the provision for a maximum, no state court could be certain that the Supreme Court would sanction the measure of total capital stock with no maximum limit, even when applied to a local business easily severable from an interstate business. The decisions of the Supreme Court left the question open, and the opinions of the justices did not fill the gap with any distinct announcement. This much, however, was clear. The Baltic Case did not overrule the Western Union Case. It recognized the authority of the earlier decisions, but distinguished the case before it on the two grounds that the tax and the business on which it was imposed both differed from those involved in the Western Union Case and those following it [12] in which the states were held to have exceeded their powers.

The Western Union Case and the Baltic Case gave the state courts much food for thought. From the difficulties which beset them, it is apparent that the Supreme Court had failed to make clear the precise extent to which the Western Union Case had qualified the doctrine of prior decisions, and the extent to which the Baltic Case limited the inferences which might be drawn from the Western Union Case. This obscurity was not cleared up during the period in which were decided the state cases to be reviewed. It is perhaps too much to say that even now the light shines bright. True, on December 10, 1917, the Supreme Court decided in *Looney*

[12] Pullman Co. *v.* Kansas, 216 U. S. 56, 30 Sup. Ct. Rep. 232 (1910); Ludwig *v.* Western Union Telegraph Co., 216 U. S. 146, 30 Sup. Ct. Rep. 280 (1910); Atchison, T. & S. F. R. Co. *v.* O'Connor, 223 U. S. 280, 32 Sup. Ct. Rep. 216 (1912). See 31 HARV. L. REV. 587–94.

v. *Crane Co.*[13] that a foreign corporation making local and interstate sales within the state could not be required to pay for the privilege of conducting local business a fee measured by total capital stock with no maximum limit. The case was treated as within the doctrine of the Western Union Case, but it was recognized that special circumstances had excluded the Baltic Case[14] and others[15] from that doctrine. It may therefore be assumed that special circumstances may take other cases out of the doctrine of the Western Union Case. Prior to the Looney Case the opinions of the Supreme Court had emphasized that every decision of the question at issue must depend on its own facts.[16] The existence of a general rule was denied. The opinion in the Looney Case, however, seems to lay down a general rule that no tax may be measured by any elements of value on which a direct tax may not be imposed. But this general rule is not applied to taxes on the franchises of domestic corporations,[17] and its generality is therefore suspect. Not of course that the rule itself is subject to exceptions, but that special circumstances may exclude particular cases from coming within it. For a complete enumeration of such special circumstances we shall have to wait until the Supreme Court has run with precision the line between what falls within the doctrine, and what without. Meanwhile state courts may still seek to differentiate cases before them from the Looney Case. It seems unlikely, however, that the Supreme Court will deal kindly with any state tax on foreign corporations engaged partly in interstate commerce, if the tax is measured by total capital stock without having a fixed limit of a reasonable amount.

The state cases to be discussed are of course to be judged in the light of what the Supreme Court had declared before they were decided. The two courts which had the greatest difficulty were those of Montana and California. With every desire to follow the Supreme Court whithersoever it might lead, the supreme courts of

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[13] 245 U. S. 178, 38 Sup. Ct. Rep. 85 (1917). See 31 Harv. L. Rev. 600–18.

[14] Note 8, *supra*.

[15] St. Louis S. W. Ry. Co. *v.* Arkansas, 235 U. S. 350, 35 Sup. Ct. Rep. 99 (1914); Kansas City, F. S. & M. R. Co. *v.* Botkin, 240 U. S. 227, 36 Sup. Ct. Rep. 261 (1916); Lusk *v.* Botkin, 240 U. S. 236, 36 Sup. Ct. Rep. 263 (1916). See 31 Harv. L. Rev. 594–600.

[16] See 31 Harv. L. Rev. 595, 598, 600.

[17] Kansas City, M. & B. R. Co. *v.* Stiles, 242 U. S. 111, 37 Sup. Ct. Rep. 56 (1916). See 31 Harv. L. Rev. 599–600.

these two states found the path dimly lit. A review of their wanderings may perhaps shed some additional light on the controlling considerations which guided the Supreme Court, and may at the same time suggest how the Supreme Court might have indicated somewhat more clearly what those considerations were. It will appear that the chief cause of the distress under which the Montana and California courts labored was the failure to appreciate that the Supreme Court was deciding only the particular cases before it, and was, according to its professions, influenced by the characteristics of the business involved as well as by the provisions of the statutes. The fact that recently in the Looney Case the Supreme Court appears to be finding a yardstick which will apply indiscriminately to all kinds of business, does not require us to forget that previously the court did not fix its attention exclusively on the language of the statutes.

I

The first case to come before the Montana court was *Chicago, M. & St. P. Ry. Co.* v. *Swindlehurst*,[18] which held invalid a requirement that foreign corporations should pay fees, graduated according to capital stock, for filing with the designated state officer copies of their charter, or of certificates for increase of their capital. The complainant was an interstate railroad, chartered by Wisconsin, which was desirous of purchasing the property of an interstate railroad chartered by Washington, and carrying on both local and interstate business in Montana. Neither the statute nor the business could be differentiated from those involved in the cases on the Kansas and Arkansas statutes in the Supreme Court. The only point of difference is thus stated and dismissed in the opinion of the Montana court by Brantly, C. J.:

> "Some effort was made by counsel for appellant to maintain the contention that in each of the cases cited the question involved was whether the corporations which were already doing business in the state should be excluded therefrom; whereas in this case the question is whether a corporation shall be permitted to come into the state to engage in business. A reading of these cases, however, leads to the conclusion that this difference in the situation of the parties cannot affect the result." [19]

[18] 47 Mont. 119, 130 Pac. 966 (1913). [19] 47 Mont. 119, 126–27, 130 Pac. 966 (1913).

That this interpretation was warranted can hardly be denied. Yet it is also true that a state court less willing to accept the new doctrine of the Supreme Court might have taken the position that, since both Mr. Justice Harlan and Mr. Justice White laid stress on the fact that the Western Union Company and the Pullman Company had been in the state for a considerable time, carrying on all kinds of business, and had acquired property of a permanent nature, the cases excusing them from the Kansas and Arkansas taxes did not apply to a corporation which was outside the state, asking to be let in. So far as the actual decisions of the Supreme Court go, the doctrine of the Western Union Case has not yet been applied to a foreign corporation still on the threshold. In the Looney Case [20] the complainant had been doing business in the state for over ten years and had acquired two warehouses in the state. The Stiles Case [21] established that the Western Union doctrine does not apply to a domestic corporation created after the passage of the law objected to.

If the doctrine of the Western Union Case applies to a foreign corporation when first knocking at the door, it would seem that there must also be a doctrine that a state cannot exclude from local business a foreign corporation seeking to come in to do a combined local and interstate transportation business. For it would be absurd to permit a state to forbid local business, if it cannot charge what it pleases for permission to enter the state to engage in such business. It would seem that Mr. Justice Holmes must agree with this, for his dissent was based on the converse proposition that it was absurd to deny to a state the power to tax local business as it pleases, if the state may forbid such business.[22] If the Supreme Court follows the Montana court, it should go a step further and declare that a foreign corporation, seeking to engage in interstate transportation within a state, cannot be prevented from entering to carry on domestic commerce, if the conduct of such domestic commerce is essential to the satisfactory and economical conduct of interstate commerce.

The Montana statute involved in the Swindlehurst Case came before the Montana court again in *State* v. *Alderson*.[23] The complainant was the General Electric Company, and the business

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[20] Note 13, *supra*.

[21] Note 17, *supra*.

[22] See 31 HARV. L. REV. 585–86.

[23] 49 Mont. 29, 140 Pac. 82 (1914).

which it sought to do in Montana was held to be a "strictly private, intra-state business." In the interim between the Swindlehurst Case and this case, the United States Supreme Court had decided the Baltic Case. The Alderson Case is not important for the actual point which it decides, for it is based, not on the distinction between the Western Union Case and the Baltic Case, but upon the fact that the General Electric Company did not enter for interstate commerce at all, and upon the rule of law that therefore its claim of exemption was foreclosed by *Paul* v. *Virginia*[24] and *Hooper* v. *California*.[25] The Baltic Case was referred to as possibly qualifying the rule of *Paul* v. *Virginia* to the extent that, though the state may entirely exclude a foreign corporation seeking to do only local business, it must not do so conditionally, if the condition imposed is bad *per se*.[26] After quoting from the opinion in the Baltic Case, Judge Holloway adds:

"Whatever may finally be determined to be the extent of state control over a foreign corporation situated as relator is, we are satisfied that the exaction demanded in this instance does not infringe upon any right of this relator which is guaranteed to it by the Constitution of the United States, and that the state may rightfully say: You may come into this state and engage in local, private business only on condition that you pay the fee required under section 165 above. *Kehrer* v. *Stewart*, 197 U. S. 60, 25 Sup. Ct. 403, 49 L. Ed. 663; *Allen* v. *Pullman Co.*, 191 U. S. 171, 24 Sup. Ct. 39, 48 L. Ed. 134; *Pullman Co.* v. *Adams*, 189 U. S. 420, 23 Sup. Ct. 494, 47 L. Ed. 877."[27]

From other language in the opinion, it seems that the Montana court thought that the Supreme Court meant in the Western Union Case to declare that an excise fee on a foreign corporation, doing interstate commerce of any kind within the state, was a property tax if measured by property, and that in the Baltic Case the Supreme Court receded from that position, and held that an

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24 8 Wall. 168 (1869).

25 155 U. S. 648, 15 Sup. Ct. Rep. 207 (1895).

26 Since the decision of Looney *v.* Crane Co., note 13, *supra*, we know that this is the declared doctrine of the Supreme Court with reference to state taxation of a foreign corporation manufacturing goods in other states and making local and interstate sales within the state. It is possible, too, that the Supreme Court may in time extend its expanding doctrine to foreign corporations doing only intra-state commerce within the state. For the Looney Case purported to be based on the due-process clause as well as on the commerce clause. See 31 HARV. L. REV. 603, 613.

27 49 Mont. 29, 37, 140 Pac. 82 (1914).

excise tax measured by property would not be a property tax.[28] Speaking for the court, Judge Holloway says:

> "We are unable to appreciate the distinction attempted to be made by the Supreme Court of the United States between the Kansas statute, considered in *Western Union Tel. Co.* v. *Kansas*, above, and held to impose a general tax upon all the property of the company, and the statute of Massachusetts, considered in *Baltic Mining Co.* v. *Massachusetts* . . . and held to be a mere excise; but, if we have accurately characterized our section 165 above, the latest pronouncement by that court justifies the existence of our statute and the method employed for determining the amount of the tax. It may be that our legislation is unwise in failing to fix a reasonable limit upon the amount to be exacted from any one corporation; but, if the authority is lodged in the state to exclude the relator altogether or to impose such terms to its admission here as may seem expedient, then the amount of the fee affords no tenable ground of opposition to the validity of the statute. If the amount demanded is more than the local, private business of relator will justify it paying, the tax can be avoided altogether by a renunciation of its intention to do such business. The state does not seek to compel it to engage in business here, nor does it attempt to collect this fee in the sense that property taxes or ordinary debts may be enforced. It merely says to the relator: You may engage in local, private business in Montana if you conform to the conditions imposed; otherwise you must stay out." [29]

It is possible, however, that the Montana court appreciated one of the distinctions between the Western Union Case and the Baltic Case without appreciating that it so appreciated it. For throughout the opinion it refers to the business of relator as private and intra-state. The reference to the fact that the business was private distinguishes it from the transportation business which employs the same facilities in intra-state and interstate commerce. On the other hand, there is evidence that the Montana court thought this distinction of no importance. For, in dealing with the contention of the complainant in the Alderson Case that the Swindlehurst Case had declared section 165 unconstitutional, and that, therefore,

[28] This seems to be a misconception. The Supreme Court did not differentiate the two cases on the ground that one involved a property tax, and the other an excise tax, but on the ground that one involved an invalid excise tax, and the other a valid one. The reasons given why the later Massachusetts excise was valid included the provision for a maximum, and the character of the particular business on which the tax was imposed.

[29] 49 Mont. 29, 34–35, 140 Pac. 82 (1914).

the secretary of the state was without authority to demand any fees thereunder, it conceded that its language in the earlier case was not apposite, since it seemed to imply that the fee could not be demanded of any foreign corporation, and it adds:

> "To have been technically exact, we should have said in the Swindlehurst case that section 165 does not have any application to foreign corporations seeking to engage in interstate commerce in this state. This is our holding, and, thus stated, the statute is left intact to apply to foreign corporations over which this state has the right to exercise some degree of regulation or control." [30]

The Montana court therefore construes the words, "every foreign corporation," contained in section 165 so as to apply only to foreign corporations not engaged in interstate commerce, under the familiar principle that a statute will if possible be so construed as to render it constitutional. Thus the Montana statute is assumed to be inapplicable to any foreign corporation engaged in any kind of interstate commerce within the state. In this the Montana court foreshadowed the decision of the Supreme Court in *Looney* v. *Crane Co.*[31] But the Montana court did not base its belief on the failure of the Montana statute to set a maximum to the annual charge, as is evident from its declaration that "the amount of the fee affords no tenable ground of opposition to the validity of the statute." [32] So the Baltic Case is evidently given no effect with respect to corporations engaged in interstate commerce. There is therefore considerable evidence that the Montana court was correct in its assertion that it failed to appreciate the distinction between the Western Union Case and the Baltic Case.

The Montana supreme court was not the only one perplexed by the Western Union Case and those following it. In *H. K. Mulford Co.* v. *Curry* [33] the California supreme court had to deal with a statute requiring foreign corporations to pay a fee measured by total capital stock for filing with the secretary of state copies of certain documents, whose filing was a condition prerequisite to doing business in the state. The complaining corporation was a manufacturer and seller of medicines with its principal place of business in Philadelphia. It maintained a branch house in San

[30] 49 Mont. 29, 39, 140 Pac. 82 (1914).

[31] Note 13, *supra*.

[32] 49 Mont. 29, 34, 140 Pac. 82 (1914).

[33] 163 Cal. 276, 125 Pac. 236 (1912).

Francisco from which it filled orders from California and neighboring states, so that in California it was engaged in both intra-state and interstate commerce. The opinion of the court by Judge Henshaw states the doctrine of the Western Union and Pullman cases[34] without any reference to the kind of business in which the corporations there protesting were engaged, except that it was both intra-state and interstate commerce. He mentions the fact that the Supreme Court decisions were rendered by a bare majority of a sharply divided court, and says that the "decision of the case at bar was deliberately delayed to note whether any recession from the views expressed in those cases would follow from the change in the personnel of the court." [35] But instead of a recession, he adds, the doctrine was affirmed by an undivided court in *Atchison, Topeka and Santa Fe R. R. Co.* v. *O'Connor*.[36] And then he says of the case before him:

> "The minutest investigation and the most careful consideration fail to disclose any ground upon which the case here at bar may be distinguished from those cited. The legal parallelism between this case and that of *Ludwig* v. *Western Union Telegraph Co.*, . . ., is perfect. Both corporations were engaged in *inter* as well as *intra*-state business. Both were so engaged before the passage of the excise law in question." [37]

Then follows a review of the Ludwig Case,[38] and the statement that the parallelism between it and the case at bar is so perfect "as to render futile any attempt to distinguish them, and thus to save the California laws." [39]

The opinion next proceeds to discuss the effect of the Supreme Court decisions on other applications of the state statute than the one involved in the case before the court. This is prefaced by a reference to the "further duty" of the court "in pointing out for future legislative action the limitations upon the power of the state in dealing with foreign corporations." [40] It is then set forth that the principle of the Western Union Case must apply to a domestic, as well as to a foreign, corporation engaged in combined intra-state and interstate commerce, since, if regulation which is unlawful when separately considered cannot be justified as the

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[34] Notes 4 and 12, *supra*.

[35] 163 Cal. 276, 282, 125 Pac. 236 (1912).

[36] Note 12, *supra*.

[37] 163 Cal. 276, 282–83, 125 Pac. 236 (1912).

[38] Note 12, *supra*.

[39] 163 Cal. 276, 284, 125 Pac. 236 (1912).

[40] 163 Cal. 276, 285, 125 Pac. 236 (1912).

price of one privilege, it cannot be justified as the price of another. "The attention of the Legislature is thus directed to the fact that the law in question can apply only to domestic corporations nowhere engaged in interstate business, and to foreign corporations seeking to enter the state solely to do domestic business." [41]

Judge Henshaw next points out that in the Western Union Case and the Pullman Case the Kansas statute was held unconstitutional under the Fourteenth Amendment as well as under the commerce clause. From this he concludes that a state cannot tax a foreign corporation engaged solely in *domestic* commerce by any method which results practically in taxing property without the state, "and therefore beyond the jurisdiction of the taxing power of the state." [42] Thus the Supreme Court is taken to mean that under no circumstances can a state exact, even as the price of some privilege which it might withhold, any imposition which would be improper as a simple tax on property or on an occupation.

"These constitutional questions thus decided are, as we have pointed out, in no way correlated, but are entirely separate and distinct. It is but the indulgence of futile and unwarranted speculation to say that the Supreme Court of the United States would call in the fourteenth amendment to the aid of a foreign corporation doing an interstate business to overthrow a state tax law, and would not invoke it in the case of a foreign corporation engaged in purely domestic business, notwithstanding that the tax upon the capital stocks of the foreign corporations (and thus the tax upon the property without the jurisdiction of the state) was, in both instances, identically the same. Nor can relief be found in a refusal to call such a license fee a tax. A state court may call it a fee or an exaction or a regulation; but the Supreme Court of the United States will call it a tax if, in its effect, it partake of the nature of a tax." [43]

After this decision, the Supreme Court declared in *Baltic Mining Co.* v. *Massachusetts* [44] that foreign corporations engaged in certain kinds of business could be subjected to a limited annual excise measured by total capital stock for the privilege of engaging in domestic commerce, even though such corporations were also engaged in interstate commerce. Two years later in *Albert Pick*

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[41] 163 Cal. 276, 286, 125 Pac. 236 (1912).
[42] 163 Cal. 276, 287, 125 Pac. 236 (1912).
[43] 163 Cal. 276, 288–89, 125 Pac. 236 (1912).
[44] Note 8, *supra*.

& Co. v. *Jordan*,[45] the California supreme court again passed on the California statute imposing on foreign corporations an annual excise measured by total capital stock. The complaining corporation manufactured ceramic articles in Chicago. It had a branch house in San Francisco, from which sales were made to purchasers in California and neighboring states. It was compelled by the California court to pay the annual excise measured by its total capital stock. Judge Henshaw was well aware that this decision violated the advice to the legislature given in his previous opinion in the Mulford Case,[46] though the judgment in that case related to the original charter fee, and not to the annual excise. The basis for the change of doctrine was the intervening decision of the Supreme Court in the Baltic Case.

Judge Henshaw reviews at length the Supreme Court decisions prior to the Mulford Case, and states that he and his colleagues had concluded from those decisions that "the Supreme Court meant and declared, for the indicated reasons, that the method of charging a fee upon foreign corporations for the right to do a local business on or based on the total capital stock of such corporations was forever inhibited. . . ."[47] Reference is then made to the dissenting remark of Mr. Justice Holmes, expressing his curiosity as to what objection could be raised to a specific tax of the same amount as that reached under the computation required by the Kansas statute,[48] and answer is essayed as follows:

"We believed that the answer would be, as above indicated, that it was not the *amount* of the charge which determined the invalidity, but the fact that in its form the charge was laid upon property without the taxing power of the state, and that to submit to the payment of it in such a form (that is, a tax on all the capital stock) would be to force the surrender upon the part of the corporations of their well-defined constitutional rights.[49]

"These, then, were some of the conclusions which we drew from the decisions of the Supreme Court, and which, with more or less completeness, we sought to declare in *Mulford Co.* v. *Curry*. One part of the

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[45] 169 Cal. 1, 145 Pac. 506 (1915).

[46] Note 33, *supra*.

[47] 169 Cal. 1, 16, 145 Pac. 506 (1915).

[48] Quoted in 31 HARV. L. REV. 594.

[49] 169 Cal. 1, 16, 145 Pac. 506 (1915). Continuing, Judge Henshaw says: "Thus, if a man who is on his way to church to give a hundred dollars to charity is robbed of that hundred dollars by a highwayman, his financial condition is exactly the same as it would have been had he carried out his purpose. Yet it will not be said that this fact leaves him uninjured and without grievance."

judgment of the Supreme Court we conceived to be apodictic, and that was that all the capital stock of such a corporation could not be subjected to any tax without doing violence to the Constitution of the United States, and it was under this conviction that we sought in *Mulford Co.* v. *Curry* to enlighten our legislative department as to the danger which would attach to all laws basing license fees of a foreign corporation on this method of taxation." [50]

But this understanding of the doctrine of the Supreme Court was succeeded by confusion after its decision in the Baltic Case. Judge Henshaw refers to the reasons given by the Massachusetts court for not applying the Western Union doctrine to the Massachusetts statute and the corporations complaining against it. These were (1) the fact that the Massachusetts statute, unlike that of Kansas, fixed a maximum to the annual imposition, and (2) the further fact that the corporations resisting the law of Kansas were common carriers, whose "local business could not be given up without impairing their capacity to transact their interstate business," [51] while the Massachusetts statute did not apply to common carriers nor to corporations engaged solely in interstate commerce, "nor yet to corporations carrying on both interstate and domestic commerce, whose domestic or intra-state business was conducted in such close connection with the other that it could not be abandoned without serious impairment of the interstate business." [52]

With evident amazement Judge Henshaw notes that the "Supreme Court of the United States adopts without reservation the determination of the Supreme Court of Massachusetts that this fee is an excise tax as distinguished from a property tax." [53] He says, however, that "it by no means follows that, being an excise tax, this is conclusive that it is not levied upon property." [54] He does not see how it is relieved from the "condemnation imposed upon the Kansas statute for attempting to do the same thing by fixing or basing its tax on the total capital stock of the corporation." [55] The limitation of the amount exacted in any one year seems to him immaterial, since, if "the principle upon which its tax is based is a sound one, it may to-morrow increase the amount

[50] 169 Cal. 1, 17, 145 Pac. 506 (1915).

[51] 169 Cal. 1, 18, 145 Pac. 506 (1915.)

[52] 169 Cal. 1, 19, 145 Pac. 506 (1915).

[53] *Ibid.*

[54] *Ibid.*

[55] 169 Cal. 1, 20, 145 Pac. 506 (1915).

of the tax to any extent." [56] Nor does Judge Henshaw appreciate the force of the distinction between the business of a common carrier and that of manufacturing and selling goods.

"It is true that in the earlier cases the corporations involved were common carriers, and the Supreme Court of the United States makes mention of that fact in the Dental Case, but it does not say that this consideration influenced or was determinative of the controversy. To the contrary, it does say that all corporations engaged in interstate commerce are under the equal protection of the commerce clause of the Constitution, and, indeed, no distinction between them can justly be drawn. If it is important that common carriers — the instrumentalities by and through which commerce is conveyed — shall be protected from unwarranted burdens, it is equally necessary that the owners of the commerce to be conveyed should receive a like protection. While interstate commerce would unquestionably be vitally impaired if common carriers were eliminated, interstate commerce would be totally destroyed if the goods, wares, and merchandise embraced within the meaning of the word were debarred from interstate and foreign transportation." [57]

The California court concedes that the deprivation of the local business of common carriers is "an injury and impairment of their business as a whole," [58] but it insists that "this is equally true of every commercial corporation likewise engaged in interstate and domestic business." [59] Of course in this the California court is mistaken, if, by "equally," it means "to the same extent." If the S. S. White Dental Manufacturing Company were taxed for its local business in Massachusetts so heavily that the local business was unprofitable, it might close its local branch, reduce thereby its expenses, and then make its Massachusetts sales through solicitors from its Philadelphia office, filling from the Philadelphia warehouses all orders obtained through such solicitors. Closing down the domestic business would increase the interstate business, and the interstate business would be immune from state interference. If the common carrier gives up local business, it cannot accommodate its would-be patrons by carrying them or their goods across state lines, for that would not meet their needs. Moreover, the abandonment of the local business of a common carrier will not be followed by any such proportionate reduction

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[56] 169 Cal. 1, 20, 145 Pac. 506 (1915). [57] *Ibid.*
[58] 169 Cal. 1, 21, 145 Pac. 506 (1915). [59] *Ibid.*

in operating costs as ensues from the closing of the local sales office of a foreign corporation engaged in manufacture and sales.

It is because of this failure to recognize the significance of the economic integration of domestic and interstate business which uses the same facilities for both, and needs nearly as extensive facilities for either as for both, that the California court says of the opinion of the Supreme Court in the Baltic Case:

"Again, we fail to perceive how every word of this might not equally well have been said in the Western Union Telegraph Company Case, thus forcing the irresistible conclusion that the Supreme Court has receded from the position which it took, and has abandoned the views which it expressed in that and the like cases." [60]

But Judge Henshaw assumes that this interpretation of the Baltic Case is incorrect, since he is "confronted in the same opinion with the declaration of the court that it has 'no disposition to limit the authority of those cases.'" [61] With becoming modesty and pleasing humor he adds:

"We are constrained to admit our inability to harmonize this language and these decisions, though we make haste to add that undoubtedly the failure must come from our own deficient powers of perception and ratiocination, and for this deficiency it is no consolation to us to note that our Brethren of the Supreme Court of Montana are similarly afflicted." [62]

The intellectual difficulties of the California court were enhanced by their acceptance of the language of the Supreme Court in the Western Union and Pullman cases as a declaration of absolute and universal principles, when, in reality, that language had particular reference to the results of applying the particular statute before the court to the particular business of the particular complainants. It may well be that the judges of the Supreme Court must accept some of the responsibility for being misunderstood by their brethren in the state courts. Certainly the *dictum* of Mr. Justice Harlan in the Western Union Case, with reference to a domestic corporation soliciting orders for goods manufactured in other states,[63] would justify the assumption that he, and the

[60] 169 Cal. 1, 24, 145 Pac. 506 (1915).

[61] *Ibid.*

[62] *Ibid.* Judge Henshaw then quotes the excerpt cited above in note 29.

[63] Quoted in 31 HARV. L. REV. 591–92, note 71.

three, and possibly, four, judges who agreed with him, were announcing the doctrine that no imposition could be justified as the price of any privilege, unless the same imposition would be entirely proper as a simple property or occupation tax. This is also the inference to be drawn from the latest declaration of the Supreme Court in the Looney Case.[64] But in seeking to understand judicial opinions we must not confuse a *façon de parler* with a *ratio decidendi.* There was enough emphasis put upon the character of the business in the Western Union Case to invite any state court to appreciate that the broad declarations scattered through the opinions did not apply *ex proprio vigore* to other kinds of business or to modified forms of the Kansas statute. The Massachusetts court realized this and drew distinctions [65] which were later ratified by the Supreme Court in the Baltic Case.[66] That ratification made it clear that the mere flavor of total capital stock would not of necessity make an excise on foreign corporations unpalatable to the Supreme Court. But even then the Montana and California courts did not understand what was incubating. They were searching for a sign. They saw recent developments as doctrine and not as a way of adjustment. And as doctrine the decisions exemplified the work of Scriabine rather than of Mozart. The Stiles Case [67] and the Looney opinion, when heard together, make the dissonance of doctrine complete. After the Looney opinion, the courts of Montana and California must be pardoned, even if they cannot be exonerated. But the pardon, it is to be feared, will afford no more consolation to Judge Henshaw of the California court than did the fact that his "Brethren of the Supreme Court of Montana [were] similarly afflicted." [68]

II

The supreme court of Idaho, however, did not suffer from the same affliction as its neighbors. In *Northern Pacific Railway Co.* v. *Gifford,*[69] handed down after the Supreme Court's decision in the Baltic Case, the Idaho court evinced its insight into what was going on. The Gifford Case involved a statute imposing on foreign

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[64] Note 13, *supra.*

[65] In the cases cited in note 76, *infra.*

[66] Note 8, *supra.*

[67] Note 17, *supra.*

[68] 169 Cal. 1, 24, 145 Pac. 506 (1915). The passage is quoted on page 735, *supra.*

[69] 25 Idaho 196, 136 Pac. 1131 (1913).

as well as domestic corporations, for the privilege of doing local business within the state, an annual tax graded in accordance with the total capital stock and limited to $150. The complainant was a foreign corporation running an interstate railroad which urged that its local business was done at a loss instead of a profit. The Idaho court ruled that the Idaho statute was "freer from objection than the Massachusetts statute" sustained in the Baltic Case, because the maximum imposition was so much less. Ailshie, C. J., after reviewing the state and federal cases, observed that the court was convinced "that the supreme court intended to determine the *effect* of the statute as it will apply in *actual practice*, rather than decide it upon the *theory* of *any* apprehended dangers which might flow from other similar legislation which might prove more exacting." [70] It was suggested that if the maximum fee under the Idaho statute had been $50,000 instead of $150, the Supreme Court "might hold that it unreasonably burdens interstate commerce, although the company has the alternative of abandoning its purely interstate business." [71] But the fee imposed in the present case was said to be "a trifle" and not susceptible of being a burden on interstate commerce. It was sanely observed that, if the domestic business was not worth paying a fee of $150 annually, the corporation "will not suffer by abandoning that business and confining itself only to its interstate business and *such business as necessarily attaches and pertains to its interstate traffic*.[72] The suggestion that under the state constitution "the respondent corporation as a common carrier could not decline or refuse to carry on its domestic or intrastate business" [73] was answered by pointing out that the constitution also provides that common carriers are subject to legislative control, and that it would be absurd to penalize a corporation for not carrying on intrastate commerce, if by reason of its refusal to pay the tax imposed thereon it had been forbidden to engage in such commerce.

Further evidence that the Idaho court appreciated the considerations which had guided the Supreme Court appears in the following comment on a quotation from the opinion of Mr. Justice Day in the Baltic Case.

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[70] 25 Idaho 196, 209–10, 136 Pac. 1131 (1913).

[71] 25 Idaho 196, 210, 136 Pac. 1131 (1913).

[72] *Ibid.*

[73] 25 Idaho 196, 210–11, 136 Pac. 1131 (1913).

"The foregoing excerpt reminds one of the impression he has after reading the Kansas cases, namely, that the really controlling consideration with the great jurist who wrote the majority opinion of the court in those cases was the fact that the amount of the excise or license fee laid upon the corporations by the statute of Kansas was so exorbitant and unreasonable that the companies would not likely have been able to pay the same and would have as an alternative been obliged to abandon their local or intrastate business if the statute had been upheld, and that the Kansas Legislature was in fact trying to tax the whole property of the corporation, and so the court concluded that it amounted to really laying a tax upon all the property of the companies, whether within or beyond the state, and had the effect of both interfering with *interstate commerce* and *taking the property* of the company *without due process of law.* No such charge can be justly laid against the Idaho statute. . . . The fee charged is a trifle; the maximum that can be charged upon the largest corporation which may enter the state being only $150." [74]

Thus the Idaho court saw that the question was one of substance rather than of form. Judge Ailshie did not, it is true, make specific reference to all the items that go to make up the substance. But since the corporation before the court was an interstate railroad, it would have been *obiter* in the particular case to discuss the question whether more favor might be shown to excises on corporations making sales than to those on corporations engaged in transportation. The maximum set by the Idaho statute was so small that the character of the business of the complaining corporation may well be disregarded. It is to be anticipated that, if the Idaho statute or a similar one comes before the Supreme Court, it will be applied to a transportation corporation as well as to a company engaged in selling merchandise. But the Supreme Court would certainly insist that the maximum must be considerably less than the $50,000 mentioned by the Idaho court.

If any state should graduate its maximum in accordance with the amount of the total capital stock or of the total assets, we should approach a situation where the tax was in fact measured by total capital or total assets. Yet there is good sense in varying the maximum according to the size and business of the corporation on which the tax is imposed. It is hardly to be expected that the Supreme Court would object to an amendment to the Massachusetts statute

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[74] 25 Idaho 196, 207–08, 136 Pac. 1131 (1913).

sustained in the Baltic Case, by which the maximum was reduced for corporations having a smaller capital stock than that of the Baltic Mining Company or that of the S. S. White Dental Company. If a \$2,000 maximum removed the stain of a reference to the capital stock of corporations having \$2,500,000 and \$1,000,000 of authorized capital respectively, and \$10,776,000 and \$5,711,718.29 of assets, it is hard to see how new spots would accrue by making the maximum \$1,000 for corporations having \$2,500,000 of assets, and correspondingly less for those whose resources were smaller. A court which took the contrary position would be insisting that the states not only *may*, as in the Baltic Case, impose proportionately heavier burdens on small corporations than on large ones, but that they *must* do so. For such is the necessary result of a rigid limitation on the amount of the tax, no matter how large the corporation. Yet, if the maximum varies with the size of the corporation, the tax is apt to vary with the amount of extra-state property of the several corporations subjected thereto, and with the volume of their total business. The practical situation under such circumstances might be substantially identical with that produced by a tax measured by total capital, with no maximum, but with an insignificant rate of levy. Yet it seems probable that the Supreme Court would apply the statute with varying limits, provided all were reasonable, and would decline to apply the one which reached the same result by an insignificant rate of levy.

In spite of the well-founded objections to efforts on the part of courts to settle questions that are not before them, some tolerance might be pleaded for a hankering to propound a series of questions to the Supreme Court in the hope of obtaining definitive and specific answers. We know that, in determining the validity of excises on foreign corporations engaged partly in interstate commerce, some maximum is necessary to wash away the sins of a statute that casts glances at the corporations' total capital stock. But we do not know how high the state may make its maximum. And the Supreme Court will have to tell us as the specific cases come before it. It cannot well do so with the type of formula brought forward in the opinion in the Looney Case. No such conceptual dichotomy can minister satisfactorily to a complex situation in which so many of the elements are in reality mutually interblended. It is attractive to believe that statutes can be divided rigorously into good and

bad by a sharp line of demarcation. But this is to invoke artificial simplicity in the presence of actual complexity. The court is not entrusted with the function of passing judgment on statutes *in vacuo* or as theses nailed to the wall. Its task is the less exalted and more difficult one of deciding whether the result of applying a particular statute to the particular state of facts involved in the case at bar is consistent or inconsistent with the requirements of the Constitution. A statute on the printed page, a statute is, and it is nothing more. It is not of necessity either good or bad. The court does not pass directly on the constitutionality of statutes, but on the propriety or impropriety of action taken under them. The application of a statute to one situation may give rise to problems entirely different from those presented by its application to another. A maximum which saves a tax from imposing an appreciable burden on interstate commerce, when levied on one corporation, may not, when levied on another. It was a counsel of wisdom which the Supreme Court adopted when it declared that every case on the subject under consideration must depend upon its own facts. The seeming departure from that attitude in the Looney Case points to a way of approach that cannot claim the same commendation.

This is not to censure the actual decision in the Looney Case. There is much to be said for a flat declaration that the measure of total capital stock must be accompanied by a proper maximum limit to the annual imposition. There is sense in not undertaking to pass judgment on the propriety of each particular rate of levy. But it is confusing to be told that, if the measure of the tax includes elements which cannot be taxed directly, the existence of the federal system is impeached, so long as we know that such measures are upheld in excises on domestic corporations, and have reason to infer from the Baltic Case that they would be upheld in excises on a foreign corporation whose capital is not sufficiently large to bring it within the shelter of the maximum set to the state's demands.

The all-embracing utterances of the Supreme Court bristle with riddles. Unless the state courts seek for the implications of the Looney Case outside of the broad language of the opinion, they will find themselves beset with the same difficulties as those which puzzled the courts of Montana and California. But the decision of

the Idaho court in the Gifford Case [75] shows that those difficulties are not insurmountable. The supreme court of Massachusetts also was able to grasp that the Supreme Court was feeling its way for a practical adjustment, and that its catholic statements were put forth as instruments rather than as the all-inclusive final truths which by their terms they seemed to declare. The Massachusetts decisions in the Baltic and White Dental cases [76] indicated this. The two subsequent cases of *Marconi Wireless Telegraph Co.* v. *Commonwealth* [77] and *International Paper Co.* v. *Commonwealth* [78] confirm it. The Marconi Case involved the application to nine foreign corporations of the statute upheld and applied in the Baltic Case. The International Paper Case involved this statute and a later amendment imposing on foreign corporations an additional excise of one one-hundredth of one per cent of the par value of authorized capital stock in excess of ten million dollars, with no maximum limit set. It may well be that, in this latter case, the Massachusetts court has sanctioned an adjustment which will be upset by the Supreme Court. But this need not detract from our satisfaction that the Massachusetts court has viewed its task as one of finding an adjustment, rather than one of setting up categories which profess to be mutually exclusive, when in fact the line which marks their boundaries is fuzzy, and each category inevitably contains certain particulars which lie partly within the other also.

None of the corporations concerned in the Marconi Case were common carriers, unless the Marconi Wireless Telegraph Company should be so regarded. That corporation was held to be not within the purview of the statute, because it "transacted no business of a domestic or local nature, except such as is inseparable from and necessarily incidental to its foreign commerce." [79] A similar ruling was made as to the business of the Pocahontas Fuel Company. Though it had an office in Boston, this office was merely the headquarters for salesmen who solicited orders from customers, and sent all orders to New York where they must be accepted and approved before a sale takes place.

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[75] Note 69, *supra*.

[76] Baltic Mining Co. *v.* Commonwealth, 207 Mass. 381, 93 N. E. 831 (1911); S. S. White Dental Manufacturing Co. *v.* Commonwealth, 212 Mass. 35, 98 N. E. 1056 (1912).

[77] 218 Mass. 558, 106 N. E. 310 (1914).

[78] 228 Mass. 101, 117 N. E. 246 (1917).

[79] 218 Mass. 558, 568, 106 N. E. 310 (1914).

The seven other corporations were all held subject to the tax. The Cheney Brothers Company used its Boston office for the storage and display of samples as well as headquarters for its sales force. The Lanston Monotype Company kept repair parts at its branch office in Boston, which were furnished to customers in Massachusetts. The test of amenability to the statute which the court applies will be apparent from the following quotation:

"These facts show the transaction of a very considerable local or intrastate business as distinguished from its interstate commerce. While there may be economies of management or advertising advantages arising from it in conjunction with the interstate business of the company, there is no necessary or inherent connection between the two. Because the interstate commerce may not be profitable except in connection with local business does not so interlock the two that they are inseparable. The protection afforded by the federal Constitution to interstate commerce against state excise taxation does not go to the extent of permitting one engaged in interstate commerce to compete in local business free from liability to an excise to the state merely for the sake of greater profit or even of making the difference between profit and loss in the business as a whole. Plainly this local business of replacing broken parts is conducted in a manner wholly distinct from the interstate business. The distinction is not whether a profit is made by the conjoining and a loss suffered by separating the intra-state and the interstate commerce, but whether the nature of the business is such that the company is free to renounce the domestic business if it chooses and still conduct its interstate commerce." [80]

In an earlier part of the opinion [81] Chief Justice Rugg had pointed out that complainants were placing a false reliance on the statement from the opinion of the Supreme Court in the Baltic Case, to the effect that the local and domestic business of the corporations there in issue was "real and substantial." [82] That, he says, "is nothing more than a statement that a shadow cannot be made the basis of an excise tax. . . .[83] But when the local and domestic business exists," he continues, "then an excise may be levied. There is nothing to indicate that a comparison between the

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[80] 218 Mass. 558, 572, 106 N. E. 310 (1914).

[81] 218 Mass. 558, 566, 106 N. E. 310 (1914).

[82] 231 U. S. 68, 86, 34 Sup. Ct. Rep. 15 (1913). The passage is quoted in 31 Harv. L. Rev. 595–96, note 89.

[83] 218 Mass. 558, 566, 106 N. E. 310 (1914).

total business of the company and its local business was intended. Such a basis has never before been intimated." [84] Some question must attach to this remark because of the succeeding statement that the contention of complainant is directly contrary to *Ficklen* v. *Shelby County*.[85] That case was based largely on the authority of *Maine* v. *Grand Trunk Ry. Co.*,[86] and the Maine Case was subsequently treated in *Galveston, H. & S. A. Ry. Co.* v. *Texas*,[87] as involving a statute imposing a tax which was partially in lieu of a property tax. Moreover, the Western Union Case casts considerable doubt upon the present standing of the Ficklen Case. The problem of occupation and property taxes will be treated later. The Ficklen Case went on the ground that the commerce clause set no limitations whatever to the taxation of domestic business, and that ground has certainly been since abandoned. Chief Justice Rugg may perhaps have some doubts as to the authority of the Ficklen Case, for after citing it, he says that if such a principle as contended for by complainants exists in reference to any facts, "it has no relation to any of the cases at bar." [88]

"The test is whether the foreign corporation transacts domestic business substantial in its essence and not by comparison, and reasonably susceptible of separation from its interstate commerce. If it does, the state can fix its own terms so far as license fee is concerned.

"The ratio of profits on the domestic business to the license tax is an immaterial circumstance. If the license fee imposed is general in its operation and is in other respects invulnerable, the mere fact that some foreign corporation may not be able to make profits enough to meet it does not render the law unconstitutional as to that corporation. The opportunity to do business, subject to the protection of our laws and with all the advantages which arise from our markets and our financial and other resources, is the thing which is made the subject of the excise." [89]

The remaining corporations came easily within the test thus laid down. The Northwestern Consolidated Milling Company

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[84] 218 Mass. 558, 566, 106 N. E. 310 (1914).

[85] 145 U. S. 1, 12 Sup. Ct. Rep. 810 (1892).

[86] Note 3, *supra*.

[87] 210 U. S. 217, 28 Sup. Ct. Rep. 638 (1908).

[88] 218 Mass. 558, 566, 106 N. E. 310 (1914). The doubt as to the authority of the Ficklen Case is enhanced by Crew Levick Co. *v.* Commonwealth, 245 U. S. 292, 38 Sup. Ct. Rep. 126 (1917).

[89] 218 Mass. 558, 566–67, 106 N. E. 310 (1914).

had seven agents at its Boston office, who solicited orders for flour from Massachusetts retailers, and then turned the orders over to Massachusetts wholesalers to fill. The fact that a natural result of filling such orders was to increase the complainant's interstate sales to the Massachusetts wholesalers was said to be immaterial. "It is too remote from the actual business of the plaintiff's salesmen to constitute that interstate commerce." [90] There were also some sales by plaintiff directly from its own local stock. The Copper Range Company was a holding company transacting no commerce of any kind. It merely received dividends from subsidiary corporations, and then paid dividends to its own stockholders. It was said that, though "the legal domicile of the plaintiff is in Michigan, its substantial home appears to be in this state, where its essential corporate faculties are exercised." [91] The Champion Copper Company owned a mine in Michigan. Its sales were made through its New York office. Boston was the seat of its financial management. In Boston were the offices of the president and treasurer. Five of its directors lived in Massachusetts, and the directors' meetings were held in that state. The court refers to the "interesting question" whether a corporation could manage all its interstate commerce in a state and still be exempt from a local excise, but holds that this is not the question at bar, for the "corporate activities conducted at Boston constitute a doing of business which has no direct relation to commerce." [92]

Another of the litigants, the White Company, an Ohio corporation manufacturing automobiles in Ohio and owning a garage in Boston, conceded that it was doing domestic business in Massachusetts, but it objected that the excise on foreign corporations was larger than when it was admitted to the state, and that it was therefore denied the equal protection of the laws. This claim was based on *Southern Railway Co.* v. *Greene*,[93] which held that a railroad company which had acquired a substantial amount of property of a permanent character within the state had become a "person within the jurisdiction" of the state, and so could not be discriminated against in favor of domestic corporations conducting the same kind of

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[90] 218 Mass. 558, 575–76, 106 N. E. 310 (1914).
[91] 218 Mass. 558, 577, 106 N. E. 310 (1914).
[92] 218 Mass. 558, 579, 106 N. E. 310 (1914).
[93] 216 U. S. 400, 30 Sup. Ct. Rep. 287 (1910).

business. The claim of the White Company is dismissed on the ground that its property is of a kind readily salable for other uses, and is not like railroad property which cannot be advantageously disposed of if the business is abandoned. This seems a sound distinction between the property involved in the principal case and that owned by the Southern Railway Company. But a simpler ground for dismissing complainant's contention would be that the Southern Railway Case involved discrimination between foreign and domestic corporations, and not merely an increase in taxation. The Supreme Court decisions warrant no doctrine that the equal-protection clause prevents a state from increasing its taxation on foreign corporations, provided it does not in so doing discriminate in favor of domestic corporations. The foundation for such claims, when any exists, is the obligation of contracts clause,[94] or the due-process clause as interpreted and applied in the concurring opinion of Mr. Justice White in the Western Union Case,[95] and later adduced by him in the Looney Case.[96]

III

In none of the foregoing cases have the foreign corporations been engaged in manufacturing within the state. Their branches within the state were for the purpose of disposing of products made in other states. Such part of their business as was intra-state in character consisted of sales within the state of property previously introduced. In *International Paper Co.* v. *Commonwealth*,[97] however, the Massachusetts court had to deal with the rights of a foreign corporation engaged in manufacturing within the state. It did not appear what proportion of the product manufactured in Massachusetts was sold to purchasers in that state; but, of all sales to purchasers within the state, only fourteen per cent were from a Massachusetts mill. The remaining eighty-six per cent of sales to Massachusetts purchasers involved transportation from mills in other states. Of its twenty-three mills, only one appeared to be located within the state. Less than two per cent of its total assets of something over $40,000,000 were in Massachusetts.

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[94] American Smelting & Refining Co. *v.* Colorado, 204 U. S. 103, 27 Sup. Ct. Rep. 198 (1907).

[95] See 31 HARV. L. REV. 586–87.

[96] See 31 HARV. L. REV. 603, 613.

[97] 228 Mass. 101, 117 N. E. 246 (1917).

The tax to which the plaintiff objected was computed by taking one one-hundredth of its total authorized capital stock in excess of $10,000,000, with no maximum limit. Relying on the cases which hold that manufacture is not commerce,[98] the court declared that permission to conduct such business might have been entirely withheld from a foreign corporation. It is plainly implied that the state is free to measure its excise on such a foreign corporation by any method it desires. Chief Justice Rugg quoted from *Pullman Co.* v. *Adams* [99] the statement that the "company cannot complain of being taxed for the privilege of doing a local business which it is free to renounce,"[100] and added that "this is true even though the re-

[98] United States *v.* E. C. Knight Co., 156 U. S. 1, 15 Sup. Ct. Rep. 249 (1895); Kidd *v.* Pearson, 128 U. S. 1, 20, 21, 22, 9 Sup. Ct. Rep. 6 (1888); Cornell *v.* Coyne, 192 U. S. 418, 428–29, 24 Sup. Ct. Rep. 383 (1904); Hopkins *v.* United States, 171 U. S. 578, 594, 19 Sup. Ct. Rep. 40 (1898); Keystone Watch Co. *v.* Commonwealth, 212 Mass. 50, 98 N. E. 1063 (1912).

The Keystone Case was decided by the Massachusetts court before the Supreme Court decided the Baltic Case. It applied to a Pennsylvania corporation manufacturing watches in Massachusetts, the statute upheld in the Baltic Case. The opinion reiterated the previous interpretation put upon the statute to the effect that it did not apply to foreign corporations "engaged in conducting some kind of interstate commerce for hire as its principal function with which intra-state business is so closely connected that it cannot be given up without serious detriment to the interstate commerce," giving as an illustration the "telephone or telegraph business." The ocrporation had a manufacturing plant in Massachusetts worth $1,300,000, at which it employed about three hundred and seventy-five persons. Not more than two per cent of the output of this plant was sold to Massachusetts purchasers. Over ninety-five per cent was sold on orders solicited and accepted outside of Massachusetts. The court said that it was obvious "that the activities of the petitioner conducted within this Commonwealth are chiefly those of manufacture, and not of commerce." Continuing, the opinion observed:

"The maintenance of the petitioner's plant in Massachusetts is for a distinct department of its manufacture. Although manufacture contemplates commerce, that is a subsequent stage. Its manufacturing business is entirely separable from the commerce which follows and which is involved in the sale of the product. The petitioner, by reason of its several factories located in different states, does not thereby conduct a business so unified and interwoven as to be in a position similar to a telegraph or telephone company. Its factory here is separable in valuation as appears by the statement of facts. It is not a necessity for its interstate commerce nor necessarily maintained for use in connection with interstate commerce."

For a criticism of this way of looking at the relation between manufacture and commerce, see pages 747–756, *infra*. For Supreme Court decisions which qualify the Knight and Hopkins cases, *supra*, see Swift & Co. *v.* United States, 196 U. S. 375, 25 Sup. Ct. Rep. 276 (1905), and United States *v.* Reading Co., 226 U. S. 324, 33 Sup. Ct. Rep. 90 (1912).

[99] Note 3, *supra*.

[100] 228 Mass. 101, 115, 117 N. E. 246, 251 (1917). Quoted from 189 U. S. 420, 422.

ceipts from the local business do not equal the expenses chargeable against such receipts." [101] His reliance on *Pullman Co.* v. *Adams* [102] and *Allen* v. *Pullman Co.*[103] seems to indicate his conviction that the doctrine of those cases was unaffected by the Western Union Case.[104] Any such position is open to grave doubts. Certainly some foreign corporations engaged in domestic and interstate commerce within the state may complain of some taxes on the domestic business, though they are legally free to renounce that business. The language of the opinions in the Western Union Case, and of succeeding opinions expressing approval of that case, should have convinced the Massachusetts court that any foreign corporation may successfully object to any tax on its domestic business which substantially burdens its interstate business. It might have assumed that the Supreme Court would ascertain whether any tax on domestic business burdens interstate commerce by estimating the effect on interstate commerce of abandoning the domestic business. It may well be that the precedents in effect when the International Paper Case [105] was decided would not preclude this Massachusetts tax on this corporation. But this is not to say that the tax was valid by reason of the doctrine of *Pullman Co.* v. *Adams* [106] and *Allen* v. *Pullman Co.*,[107] for that doctrine had certainly been discountenanced by the doctrine of the Western Union Case.

The International Paper Case [108] raises the interesting question whether the state has more power over a foreign corporation engaged in manufacturing within the state than over one engaged in intrastate sales. It is true that manufacture is not legally commerce,[109] and that therefore it is not interstate commerce. But a foreign corporation may combine the business of manufacturing and interstate commerce, as it may combine domestic and interstate commerce. The abandonment of manufacturing may burden interstate commerce more than would the abandonment of a domestic business which is technically commerce. The state has no more power over the domestic manufacturing of foreign corporations than it has over their domestic sales or transportation. If its plenitude of power over the taxation of the exercise of corporate functions in the

[101] 228 Mass. 101, 115, 117 N. E. 246, 251 (1917).

[102] Note 3, *supra.*

[103] Note 3, *supra.*

[104] Note 4, *supra.*

[105] Note 97, *supra.*

[106] Note 3, *supra.*

[107] *Ibid.*

[108] Note 97, *supra.*

[109] Cases cited in note 98, *supra.*

business of domestic sales and transportation does not permit it to encroach by indirection on interstate commerce, why should it be given greater latitude in the taxation of the exercise of those corporate functions in the business of manufacturing? The question in every case should be whether the abandonment of the functions upon which rests the power to tax would actually burden the functions which are immune from state interference.

It is plain that the abandonment of domestic sales does not burden the business of making interstate sales to any such degree as the abandonment of domestic transportation burdens the interstate transportation. We did not know until December 10, 1917, when *Looney* v. *Crane Co.*[110] was decided, whether the Supreme Court would regard any tax on foreign corporations making local sales within the state as an interference with their interstate business. Until that decision the Baltic Case [111] was the only one that touched the question; and, in that case, the tax, though measured by total capital stock, was limited in amount. It might have been supposed that the limitation in amount would have been regarded as unnecessary, in view of the comparatively slight economic integration of domestic and of interstate exchange. But, now that the reverse turns out to be the judgment of the Supreme Court, it is not to be expected that a different attitude will be taken towards taxation of foreign corporations engaged in manufacturing within the state, merely because manufacturing is not legally commerce. True, the opinion in the Looney Case [112] may seem to mark the recrudescence of the test of artificial legal distinctions and the abandonment of the intervening test of practical results. If this were so, the Supreme Court might make use of the legal distinction between manufacturing and commerce to impute to the state, arbitrary power over foreign corporations engaged in manufacture within its borders. But the more optimistic view to take of the Looney Case is that the Supreme Court had become convinced that it was wiser to discountenance the unqualified use of the measure of total capital stock in excises on foreign corporations engaged partly in interstate commerce, and to emphasize its aversion by language so strong that state courts would know that it would require the weightiest of practical considerations to overcome the presumption of illegitimacy which such a measure creates. Under this interpretation,

[110] Note 13, *supra*. [111] Note 8, *supra*. [112] Note 13, *supra*.

practical considerations still control the decisions of the Supreme Court on the question under discussion. But now the practical considerations are not necessary to create the presumption of illegitimacy. The presumption stands unless it can be shown from the circumstances of the particular case that the apprehended interference with interstate commerce will not materialize. If this analysis of the attitude of the Supreme Court is well founded, it is not likely that the legal affinity or remoteness of commerce and manufacturing would influence the Supreme Court in deciding whether it would look more favorably on the Massachusetts tax on the International Paper Company than on the Texas tax on the Crane Company. To save the former from the excommunication visited on the latter, it would be necessary to show that there was substantially less economic integration between the various activities of the International Paper Company than between those of the Crane Company.

Just what view the Massachusetts court takes of this question is not wholly clear. Chief Justice Rugg says that the "local manufacture of paper is disconnected with the interstate business of the petitioner except as an artificial relation has been established by the petitioner,"[113] and that they "have no inherent connection one with the other."[114] This might be taken to mean that the two kinds of business could be divorced from each other without serious loss to the interstate business. But against the inference that this is what the Chief Justice has in mind is the fact that he cites cases holding that Congress cannot control manufacture,[115] and that the states are not precluded from controlling it because of the intention of the manufacturer to put his product into the channels of interstate commerce.[116]

From a business standpoint there is certainly nothing "artificial" in combining the business of manufacturing with that of the sale of the product in interstate trade. The lack of any "inherent connection" between the two would not be apparent to a man of affairs unversed in legal niceties. Nothing is more natural than that a corporation which manufactures paper should also sell it. It is natural that many consumers will dwell in other states than the one

[113] 228 Mass. 101, 112, 117 N. E. 246, 250 (1917). [114] *Ibid.*

[115] The Knight Case and the Hopkins Case, cited in note 98, *supra.*

[116] Cornell *v.* Coyne, note 98, *supra;* Kidd *v.* Pearson, note 98, *supra.*

in which the manufacture takes place. It is natural that the location of the mills should be influenced by the place where raw materials and motive power are best available. And the donor of the sources of pulp and power was not particularly mindful of state lines. The mills will seek the waterfalls. Yet under the Massachusetts doctrine the mills outside the state will increase the tax on the exercise of corporate functions within the state. If the tax is too great for the domestic manufacturing to bear, the corporation may leave the state and supply Massachusetts purchasers from its mills in other states.

It may be urged that this withdrawal from local manufacturing would impose no burden on interstate commerce. But suppose other states follow the lead of Massachusetts and impose on the exercise of corporate functions within their borders similar excessive burdens which make the corporation desist from manufacturing. How then will it supply its Massachusetts customers? The combined effect of such statutes in different states would impose serious burdens on interstate commerce. It would forbid unity of ownership and management of mills in different states. It might require that mills be less advantageously located. It would increase costs of production, by complicating the purchase of raw materials and their distribution among the mills in different states. If the state's taxing power over domestic manufacturing is unlimited, the states together may compel consumers to seek their supplies from foreign countries. It is difficult to believe that the Supreme Court would ever sustain state taxes on foreign corporations engaged in manufacturing within their borders and in other states and selling a large portion of the combined product in interstate trade, if such taxes actually resulted in substantial burdens on interstate commerce in the manufactured product.

At first glance *Kidd* v. *Pearson* [117] might seem authority for the proposition that no burden on manufacturing could by any possibility be a regulation of interstate commerce. That case allowed a state to forbid the manufacture of liquor even though the liquor was intended to be shipped out of the state. It is thus declared that a state may through its police power crush a necessary antecedent to interstate commerce. But this was before the Western Union Case.[118] A different view was taken in *West* v. *Kansas Natural Gas*

[117] Note 98, *supra*.

[118] Note 4, *supra*.

Co.[119] with regard to the attempt of Oklahoma to prevent the exportation of natural gas from the state. The power of the state over its highways and over the right of eminent domain was adduced in support of the statute, but Mr. Justice McKenna quoted with approval a statement from the Circuit Court of Appeals of the eighth circuit to the effect that "no state can by action or inaction, prevent, unreasonably burden, discriminate against, or directly regulate, interstate commerce or the right to carry it on." [120] Mr. Justice Holmes was among those who dissented, thus suggesting that the division of opinion related to the question whether the state could use its conceded powers to accomplish by indirection what it could not do directly. The logic of the Western Union Case clearly restrains state burdens on any kind of intra-state business which in plain fact amount to substantial regulations of interstate commerce. The legal separability of the subject taxed and the subject with reference to which the amount of the tax is determined is no longer controlling. The Western Union Case shifted the issue to one with respect to the facts as to the substantiality of the burden on the subject which is immune from the power of the state.

Viewing the situation as it was when the Massachusetts court decided the International Paper Case,[121] it is to be remembered that the United States Supreme Court had declared that it would look through form to substance and would judge each case according to its own facts. It might therefore have been anticipated that the Supreme Court would in each case regard the actual burden imposed by the tax in question on the interstate commerce in question. This would require it to take account of the rate of levy as well as of the measure to which that rate is applied. It was not, however, declared that this would be done. It was settled that the measure of total capital stock was proper for taxes on the franchises of domestic corporations, but improper for taxes on foreign corporations engaged in transportation. The law with respect to other foreign corporations was uncertain. It was clear that a reasonable maximum would cure the evil lurking in the measure of total capital stock, but the Supreme Court had yet to pass judgment on the use of such a measure with no limitation to the annual imposi-

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[119] 221 U. S. 229, 31 Sup. Ct. Rep. 564 (1911).

[120] 221 U. S. 229, 262, 31 Sup. Ct. Rep. 564 (1911).

[121] Note 97, *supra*.

tion. The Massachusetts supreme court, however, took the position that the absence of a maximum is immaterial, at least in excises on foreign corporations engaged in local manufacturing. It declares specifically that, under the doctrine of *Pullman Co.* v. *Adams*,[122] it is not open to the International Paper Company to urge "that the excise is 'unduly great having reference to the real value' of the property of the petitioner within this Commonwealth, or to the amount of domestic business transacted here." [123] Another reason given why the contention was not open in the particular case is that the record does not show the amount of the domestic business conducted within the Commonwealth or the real value of the property located therein. But Chief Justice Rugg adds that, even "if it be assumed that that question is open to the petitioner and that it must be decided on this record, it cannot be said that the excise is excessive." [124] The tax of $5,500 sustained in the case is said to be less than twice the annual exaction for certain classes of liquor licenses. The petitioner is said to have "extraordinarily large financial resources." And the justification for basing the amount of the tax on property, ninety-eight per cent of which is without the state, is thus expressed:

> "It cannot be presumed that it may not be worth more to such a large corporation than it would be to a small one to be permitted to go into the local markets and compete for local business as a domestic manufacturer." [125]

Doubtless this is correct. But can it be presumed that it is worth fifty times as much for this corporation to manufacture paper within the state as it would be if it manufactured paper only within the state? Chief Justice Rugg continues:

> "We know of no principle of law which requires the conclusion that a license fee of that amount is unduly or unreasonably great to a corporation of such large capital as the petitioner, for the privilege of admission to the local markets of this Commonwealth for the transaction of an intrastate business in the manufacture and sale of an undisclosed quantity of paper of undisclosed value and out of which an undisclosed profit is realized." [126]

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[122] Note 3, *supra*. [123] 228 Mass. 101, 115, 117 N. E. 246, 251 (1917).
[124] 228 Mass. 101, 116, 117 N. E. 246, 251 (1917).
[125] 228 Mass. 101, 116, 117 N. E. 246, 252 (1917). [126] *Ibid.*

This may be true enough, so far as a specific tax of $5,500 is concerned. Before the Looney Case [127] it might have been supposed to be true also with respect to a tax measured by total capital stock in excess of $10,000,000 where the rate of levy is only one one-hundredth of one per cent. But if the rate were to be raised to five per cent or ten per cent — as, under the doctrine of the Massachusetts court, it might be — the practical question would be entirely different, and, it is submitted, the legal one should be also.

The Supreme Court had declared that every tax is to be judged by its actual effect on interstate commerce and had intimated that this effect is to be determined with reference to the results of paying the tax or of abandoning intra-state business to avoid such payment. To tax a foreign corporation engaged in domestic manufacturing, $150,000 or $300,000 a year because it has a lot of mills outside the state, where under the same statute it would be taxed nothing if it had no mill except one or more in the state worth less than $10,000,000, would certainly burden the method of doing business which combines manufacturing in various states with sales among the several states. It is not unworthy of notice that this section of the Massachusetts statute, which applies only to corporations whose capital stock exceeds $10,000,000, seems designed for the express purpose of reaching corporations with manufacturing plants in several states, since many, if not most, of the corporations having manufacturing plants only within the state will have a capital of less than $10,000,000.

The Massachusetts court had every reason to assume that the Supreme Court had thoroughly accepted and digested the realistic attitude which it announced in *Western Union Telegraph Co.* v. *Kansas* [128] and the later cases [129] which were distinguished from that, and that therefore the Supreme Court would disallow a tax under this Massachusetts statute if the rate were increased to five or ten per cent. Before the Looney Case, the Massachusetts court might have expected that its decision in the International Paper Case would have been sustained by the Supreme Court, but it had ample warning that any decision sustaining the tax would have been put on more restricted grounds than those announced in the opinion of Chief Justice Rugg. Now that the opinion of Chief Justice White

[127] Note 13, *supra*.

[128] Note 4, *supra*.

[129] Cases cited in notes 8 and 15, *supra*.

in the Looney Case makes a general principle out of what had previously been merely a guide for forming a practical judgment in each specific case, it is not to be expected that the single fact that the complaining corporation manufactures as well as sells within the state will be regarded by the Supreme Court as sufficient to exclude the International Paper Case from the doctrine of the Looney Case. There is good reason to believe that the Supreme Court will insist that a reasonable maximum is a necessary ingredient in any statute making any reference to total capital stock in prescribing the amount of an excise on foreign corporations engaged partly in interstate commerce.

The Massachusetts court, however, was not alone in sustaining a tax on a foreign corporation engaged in domestic manufacturing, where the measure adopted was the total capital stock with no provision for a maximum. The supreme court of Tennessee in *Atlas Powder Co.* v. *Goodloe* [130] relied on the Baltic Case to support such a tax, without adverting in the opinion to the significance of the absence of any provision for a maximum in the Tennessee statute. The amount imposed was $1,500 on an authorized capital stock of $5,000,000. The Tennessee assets were $305,945.11, and the assets in other states were $6,000,000. There was manufacturing in Tennessee and in other states, sales in car-load lots from other states to Tennessee, and also sales from Tennessee to other states. Just what weight the court gives to the fact that there was domestic manufacturing is not clear. It is pointed out that neither of the two corporations complaining in the Baltic Case "owned a factory in Massachusetts, but each had a local warehouse where local sales were made." [131] The situation before the Tennessee court is referred to as follows:

"One important feature in the case at bar is that it [*sic*] is engaged in manufacturing black gunpowder at its factory at Ooltewah, in this State, and it also has six storage magazines where explosives are kept. It also has its places in this State in a number of cities where local sales are made. It occurs to us that any part of this local business is of such character as to render the complainant liable to the payment of this charter tax, or tax on its right to enter the State to do intra-state business. Certainly

[130] 131 Tenn. 490, 175 S. W. 547 (1915).
[131] 131 Tenn. 490, 516, 175 S. W. 547 (1915).

the manufacturing business in this State and the operation of storage magazines are so far separated from the interstate sales of explosives that there can be but little difficulty in the conclusion that the right of the state to impose this tax is clear, and we so hold." [132]

This does not definitely declare that local manufacturing is more remote from interstate commerce than are local sales, yet it permits the inference that the Tennessee court had some such distinction in mind. On the other hand, earlier in the opinion, it was said that the complainants in both the Baltic Case and the principal case "could have omitted the local business if they saw proper, and thus separated the local business from the interstate commerce." [133] By contradistinction the Pullman Company and Western Union Telegraph Company were said to be "public service corporations" which "were bound to accept local business." [134] If this means that the doctrine of the Western Union Case is based on the fact that the complainant was under a legal duty not to abandon intra-state commerce, it is obviously incorrect. It is, moreover, inconsistent with the implication of an earlier statement of the Tennessee court to the effect that it was claimed on behalf of the companies involved in the Western Union and Pullman cases "that their business and facilities for doing business were so intermixed that a tax upon the company was necessarily a burden upon interstate business, and it was so held by a majority of the court." [135] This and other statements in the opinion make clear that the Tennessee court appreciated that it was on the ground of the economic, and not the legal, inseparability of local and interstate business that the Western Union Case was decided.

While both the Massachusetts court and the Tennessee court attach importance to the fact that the corporations whose plaints they rejected were engaged in manufacturing within the taxing state, the opinions give reason to infer that both courts might have reached the same decision had the local business been wholly mercantile. To the extent that they assumed that this was established by the decision of the Supreme Court in the Baltic Case,[136] they were in error. The Baltic Case left the question an open one, and the opinion, taken as a whole, contained nothing inconsistent with

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[132] 131 Tenn. 490, 516–17, 175 S. W. 547 (1915).

[133] 131 Tenn. 490, 516, 175 S. W. 547 (1915).

[134] *Ibid.*

[135] 131 Tenn. 490, 510, 175 S. W. 547 (1915).

[136] Note 8, *supra.*

the subsequent decision in the Looney Case. The Looney Case,[137] of course, will require the reversal of the Massachusetts and Tennessee decisions, unless the Supreme Court should regard the distinction between manufacture and sales as sufficient to exclude these state decisions from the "controlling principle" announced in the opinion in the Looney Case.

A somewhat different phase of the problem is presented by *General Ry. Signal Co.* v. *Commonwealth*,[138] decided by the supreme court of appeals of Virginia on January 13, 1916. This case involved the power of the state over a foreign corporation engaged in performing a contract within the state which involved equipping a railroad with safety devices. It appears that the corporation in question based its complaint before the state corporation commission wholly on the ground that it was engaged entirely in interstate commerce, and was therefore beyond the taxing power of the state. The commission decided this point against the corporation, on the authority of *Browning* v. *Waycross*,[139] which sustained a municipal license tax of $25 on agents or dealers "engaged in putting up or erecting lightning rods within the corporate limits." The Virginia court of appeals adopts the opinion of the state corporation commission on this point. In this it was clearly correct. Plainly the Signal Company did some business within the state which was not interstate commerce, and therefore it was not wholly immune from the taxing power of the state. As Chief Justice White observed in the Lightning Rod Case,[140] the construction work done within the state "involved no question of the delivery of property shipped in interstate commerce, or of the right to complete an interstate commerce transaction, but concerned merely the doing of a local act after interstate commerce had completely terminated." [141] Whether the Chief Justice was wholly warranted in an earlier statement that "such business was wholly separate from interstate commerce" [142] is perhaps another question. The answer to it has some bearing on the measure which the state may adopt for determining the amount of its tax on this local business.

[137] Note 13, *supra*.

[138] 118 Va. 301, 87 S. E. 598 (1916).

[139] 233 U. S. 16, 34 Sup. Ct. Rep. 578 (1914).

[140] Note 139, *supra*.

[141] 233 U. S. 16, 22–23, 34 Sup. Ct. Rep. 578 (1914).

[142] 233 U. S. 16, 22, 34 Sup. Ct. Rep. 578 (1914).

This question was raised when the Signal Company appealed from the corporation commission to the state court, and insisted that, even if it were subject to taxation because engaged partly in intra-state commerce, the state was nevertheless imposing an unconstitutional burden on interstate commerce by basing the amount of the imposition on the total capital stock. The opinion of the Virginia court on this point is as follows:

"In support of this contention, which we think is without merit, the appellant relies upon cases involving the right of the state to impose a license tax upon public service corporations engaged in both interstate and intra-state commerce within the state, which announce the well-settled doctrine that a state cannot lay a tax upon interstate commerce in any form.

"These cases have no application to the present case. Here the defendant is a commercial corporation carrying on a purely local and domestic business quite separate from their [*sic*] interstate commerce transactions. Under such circumstances the state has the right to prescribe the conditions upon which such a corporation may do its intra-state business, provided it lays no burden upon its interstate business. This question is disposed of by the case of *Baltic Mining Co.* v. *Massachusetts*, 231 U. S. 68, 34 Sup. Ct. 15, 58 L. Ed. 127, which holds that:

"'Where a foreign corporation carries on a purely local business separate from its interstate business, the state may impose an excise tax upon it for the privilege of carrying on such business and measure the same by the authorized capital of the corporation.'

"There is no error in the order appealed from, and it is affirmed." [143]

Thus the Virginia court disregards the fact in the Baltic Mining Case that the annual imposition under the Massachusetts statute could not exceed $2,000. The statement by the Virginia court of the holding in the Baltic Case is a quotation from the headnote in the official edition of the Supreme Court reports. That headnote, however, was unwarranted by the opinion of the Supreme Court, since it was specifically pointed out that all the facts in the case were material, and one of the facts was the $2,000 maximum. Whether the Supreme Court would uphold the Virginia court in sustaining the tax on the Signal Company should depend on the judgment it would pass on the degree of interrelation between the construction done by the corporation in Virginia and the interstate shipment to Virginia of the materials there to be affixed.

[143] 118 Va. 301, 312–13, 87 S. E. 598 (1916).

It is evident that, if Virginia is permitted to measure its tax by total capital stock, foreign corporations with large capital will be discriminated against in favor of their foreign and domestic competitors whose capital is less. The Virginia method of measurement might in many instances enable local concerns to underbid their larger rivals in other states. If the performance of the contract involved no interstate commerce, this favoritism would be impeccant, if *Horn Silver Mining Co.* v. *New York* [144] is still law. But where the materials to be affixed within the state would be brought by foreign contractors from without the state, the Horn Case would not be controlling. The case would then be within the "general principle" announced in the Looney Case. The legal separability of the activity taxed from the interstate commerce instrumental thereto would seem to afford no sensible ground for permitting an exaction which, "intrinsically and inherently considered," is beyond the power of the state.

No exception can be taken to the statement of the Virginia court, above quoted, that, if the local business is quite separate and distinct from the interstate commerce transactions, "the state has the right to prescribe the conditions upon which such a corporation may do its intra-state business, provided it lays no burden upon its interstate business." The "if" and the "provided" safeguard the statement from attack. But the application of the statement to each particular case requires consideration of the degree of economic separation between the local and the interstate business, and of the question whether the tax does lay a burden on interstate commerce.

Very likely the tax in the particular case was not unduly burdensome on interstate commerce. The authorized capital of the Signal Company was $5,000,000, and the tax was $1,000. The contracts which it was performing in Virginia called for the payment of $214,-040. It is not to be supposed that a foreign corporation would be deterred from seeking a $200,000 contract by the imposition of a tax which is only one-half of one per cent of its gross return. But if the work to be done called for the payment of only $5,000 or $10,-000, it is not likely that a foreign corporation with $5,000,000 of authorized capital would submit a bid. The Virginia statute bars large foreign corporations from making small contracts to be per-

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[144] 143 U. S. 305, 12 Sup. Ct. Rep. 403 (1892). See 31 HARV. L. REV. 613.

formed within the state. To the extent to which such corporations would perform those contracts by shipping materials in interstate commerce, the loss thereof prevents interstate commerce from taking place.

It may readily be perceived that it would be unduly vexatious, both to litigants and to the Supreme Court, to take to that high tribunal every dispute which might arise under the Virginia statute. The confusion and uncertainty which would arise if each case depended on its own facts is only too apparent. Such considerations doubtless influenced the writer of the Looney opinion in adducing "general principles" in support of the decision, rather than deciding the particular case on its particular facts. The possibility of evil with which the Virginia statute is pregnant seems sufficient to warrant the establishment of a general rule that an unbridled measure of total capital stock is vicious in all cases where it is applied to a foreign corporation which to an appreciable degree combines interstate commerce with its other activities within the state. In many instances the evil would not be averted by limiting the tax to $2,000 or to $1,000.

To a considerable extent analogous evils are possible in similar taxes on foreign corporations whose construction work within the state might be wholly unrelated to any interstate transportation. Foreign corporations of any considerable magnitude would have to be assured of a fairly large volume of business within the state before they could wisely make a contract for work therein. Excises on foreign corporations, measured, not by the amount of work done within the state, but by the wealth of the corporation doing it, must in plain fact tend to elevate state lines into hurdles to impede the course of interstate business. The Supreme Court's reference to the due-process clause, in addition to the commerce clause, in the Western Union and Looney cases, may well be an entering wedge to the overruling of *Horn Silver Mining Co.* v. *New York* [145] and to the declaration that the local business of foreign corporations, whether connected with interstate business or not, must be taxed according to the amount of the business, and not according to the resources of the corporation doing it.

Wherever a state bases the amount of its tax on values which lie beyond its borders, it is emulating the example of the hard man

[145] Note 144, *supra*.

of the parable, and seeking to reap where it sowed not, and gather where it has not strawed. Its constitutional right to do this was long ago sanctioned by the declaration of Chief Justice Marshall that the power to tax involves the power to destroy. It has taken Marshall's successors near a hundred years to break the spell of his apothegm. But now that this has been accomplished, the way is open to face anew the problem of the limits of state taxation, and to abandon artificial criteria in favor of distinctions that hug the facts. This has been done in passing judgment on taxes on foreign corporations engaged partly in interstate commerce. And it has been strongly hinted that similar results will be reached under the due-process clause, and that therefore foreign corporations engaged solely in intra-state business will be relieved from taxes which are disproportionate to the business taxed. The conditions under which business is done by foreign corporations today are substantially different from those of the period when sanction was first given to the doctrine that the state has unlimited taxing power over foreign corporations not engaged in interstate commerce. The nation-wide organization of industry and commerce, and the enormous capital of the corporations whose business spans the continent, make the measure of total capital stock a most inequitable one for each state in which some fraction of that business is done. The actual menace may not be great, since large corporations may, by creating subsidiaries for operation in each of the several states, see to it that existing laws do not multiply exactions on the same economic interest. But this way of escape gives further evidence of the ineptitude of the measure of total capital stock for taxes on foreign corporations. It would be a sensible doctrine that the states must measure their taxes by property or business which they protect, and not by wealth which has its *situs* elsewhere. There is indeed more reason to restrain a state from taking toll from property or business within the boundaries of its neighbors, than to forbid it to reap a benefit from the interstate commerce which takes place within the area where its authority obtains.

IV

In all of the cases thus far considered, the excise taxes on foreign corporations have been measured by some or all of their capital

stock. But the West Virginia statute involved in *Baldwin Tool Works* v. *Blue*[146] measured the excise on foreign corporations by their total receipts within the state, including those from interstate, as well as from intra-state, commerce. From a reference to the bill, it appeared that the case involved several corporations, but the opinion does not give their names or the kind of business in which they were engaged, with the exception of one domestic corporation which was a holding company. It is evident from other language in the opinion that some of the other corporations were foreign to West Virginia. It is evident too that some of these foreign corporations were engaged in business in other states as well as in West Virginia, for the court states and rejects a contention made with reference to the provision in the statute for ascertaining the annual income of such corporations which shall be deemed to have been earned within the state. The material provisions of the statute are as follows:

"Every corporation . . . now or hereafter organized under the laws of this state, or under the laws of any other state or government and engaged in any business whatsoever in the state of West Virginia, shall pay an annual special excise tax for the privilege of carrying on or doing business in the state of West Virginia, equivalent to one-half of one per centum upon the entire net income of such company, received by it from all sources during the year, on business transacted and capital invested in this state, as hereinafter set forth. . . .[147]

"It is the intention of this chapter to assess the tax imposed thereby on the net income as defined therein of the corporations . . . arising from business transacted and capital invested in this state. Every such company having capital invested in its business in this state only, shall pay the tax upon its entire net income ascertained as herein provided; and every such company, except an insurance company, engaged in business and having capital invested and transacting business both in and out of the state, shall pay the tax upon that part of its entire net income which bears the same proportion to its whole net income that the assessed value for purposes of taxation of its assets and property within the state bears to the total assessed value of all of its assets and property in the jurisdictions where it is located."[148]

The complainants objected to any reference to property in, or receipts from, other states in determining the receipts deemed to have been earned within the state. The court's answer is brief:

[146] 240 Fed. 202 (1916). [147] 240 Fed. 202, 204 (1916). [148] 240 Fed. 202, 204–05 (1916).

"A careful consideration of the provisions of the statute as respects this question leads us to the conclusion that the method employed for ascertaining the amount of the tax which the corporation is required to pay is perhaps as fair, as a general rule, as any scheme that could be devised for that purpose. Undoubtedly the state of West Virginia has the right to base its tax upon the return of the entire net income in the respective states, and to apportion the amount of the income thus ascertained as a means of ascertaining the net income subject to taxation by the state." [149]

The authorities cited do not support the proposition. The Baltic Case [150] did not involve any reference to receipts. *United States Express Co.* v. *Minnesota* [151] used receipts as an aid in valuing property and not in assessing an excise tax. *Maine* v. *Grand Trunk Railway Co.*,[152] it is true, involved an excise tax on a foreign corporation, but the court later reinterpreted it and placed it on the ground that the tax in question was in the nature of a property tax.[153] The cases permitting the valuation of property within a state to take account of receipts from interstate commerce will be dealt with in a succeeding section of this discussion. They rest on grounds which do not apply to excise or occupation taxes.

There is no doubt that a state tax directly on receipts from interstate commerce is invalid.[154] And a tax on railroads "equal to" a percentage of receipts has been held to be as vicious as a tax levied on receipts *eo nomine*.[155] It must therefore be open to serious question whether the Supreme Court will allow a state to include in the measure of a tax on the privilege of a foreign corporation to engage in domestic business, any receipts which are from interstate commerce.[156] It has been explicitly held that

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[149] 240 Fed. 202, 206 (1916).

[150] Note 8, *supra.*

[151] 223 U. S. 335, 32 Sup. Ct. Rep. 328 (1912).

[152] Note 3, *supra.*

[153] Galveston, H. & S. A. Ry. Co. *v.* Texas, 210 U. S. 217, 226, 28 Sup. Ct. Rep. 638 (1908).

[154] Philadelphia & Southern Mail S. S. Co. *v.* Pennsylvania, 122 U. S. 326, 7 Sup. Ct. Rep. 1118 (1887).

[155] Galveston, H. & S. A. Ry. Co. *v.* Texas, note 153, *supra.*

[156] In the Galveston Case, note 153, *supra*, Mr. Justice Holmes observed that the tax in question "is merely an effort to reach the gross receipts, not even disguised by the name of an occupation tax, and in no way helped by the words 'equal to.'" This hint of the possibility of disguising the tax by calling it an "occupation tax" seems to have animated the Texas legislature to amend the statute and dub the tax an "occupation tax." There was enough in a name to persuade the court of civil

such a measure cannot be applied to a so-called "revenue tax" on a railroad corporation.[157] On the other hand in *Ficklen* v. *Shelby*

appeals of Texas to hold in State *v.* Houston Belt & Terminal Ry. Co. (Tex. App.), 166 S. W. 83 (1914), that the tax, being not on interstate receipts but on an occupation, and only measured by receipts, was not a regulation of interstate commerce. This case was criticized in a note in 28 Harv. L. Rev. 93. It was reversed by the supreme court of Texas in Houston Belt & Terminal Ry. Co. *v.* State (Texas), 192 S. W. 1054 (1917). The Texas supreme court found that that tax could not be sustained as one on "going value" as property of the complainant, since "the assessment of its property for *ad valorem* taxation under the general laws included the value which it had as property of a going concern."

The law with regard to taxes on occupations is still unsettled. Ficklen *v.* Shelby County Taxing District, notes 85, *supra,* and 158, *infra,* has not yet been overruled, though the reasoning on which it was decided has been shaken by later opinions of the Supreme Court. In Commonwealth *v.* Crew Levick Co., 256 Pa. St. 508, 100 Atl. 952 (1917), it was held without discussion that a mercantile tax may be measured by the whole volume of business, including receipts from foreign commerce. The decision of the Pennsylvania court was reversed by the United States Supreme Court in Crew Levick Co. *v.* Commonwealth, 245 U. S. 292, 38 Sup. Ct. Rep. 126. The opinion of the court endeavored to distinguish the Ficklen Case, on the ground that the Pennsylvania tax in question was not "an occupation tax, except as it is imposed upon the very carrying on of the business of exporting merchandise." It was, however, stated that the Ficklen Case "is near the border line" and "has been deemed exceptional." The authority of the Ficklen Case is narrowly limited, if not directly shaken, by this latest decision on the subject, though this decision leaves it still possible for the Supreme Court to permit taxes on taxable occupations to be measured in part by receipts not themselves directly taxable. Yet on the whole the court's attitude towards the Ficklen Case seems to be that of *de mortuis nihil nisi bonum.* In Postal Telegraph Cable Co. *v.* City of Mobile, 179 Fed. 955 (1909), an injunction was granted against the enforcement of an ordinance imposing a flat fee of $1,000 on each telegraph company doing business in the city, while in Postal Telegraph Co. *v.* City of Portland, 228 Fed. 254 (1915), a tax of $75 per quarter for the privilege of doing local business in the city was sustained. The complainant alleged that the intra-state receipts did not equal the expenses properly chargeable to intra-state business, but the court answered that the question of the reasonableness of a tax was largely legislative in character. In Postal Telegraph Cable Co. of Norfolk *v.* Norfolk, 118 Va. 455, 87 S. E. 555 (1916), the Virginia court sustained a tax of $500 per year plus $1 per pole and $1 for every hundred feet of conduit. In State *v.* Northern Express Co., 76 Wash. 636, 136 Pac. 1160 (1913), however, a tax measured by gross receipts within the state including receipts from interstate commerce was held invalid. The chief reason given was that the company under the constitution of the state was not free to renounce its local business. For a different attitude towards such a provision in a state constitution, see Norhern Pacific Railway Co. *v.* Gifford, note 69, *supra.*

It is to be anticipated that before long the Supreme Court will be called upon to tell to what extent the doctrine of the Western Union Case applies to taxes on occupations and to declare whether or not Ficklen *v.* Shelby County Taxing District, *supra,* is still law. The problem is complicated by the fact that many municipal or-

[157] Meyer *v.* Wells Fargo & Co., 223 U. S. 298, 32 Sup. Ct. Rep. 218 (1912).

County Taxing District[158] it was held that commission dealers who desired to do a combined intra-state and interstate business could be required to pay a percentage of receipts from all kinds of business. If this case can still stand, it must be either (1) because the state has more power to take toll from interstate commerce through taxes on occupations than through taxes on corporate privileges, which is unthinkable, or (2) because of a controlling distinction between the character of the commission business and that of the transportation business. A commission merchant, unlike a railroad, may abandon intra-state business without serious results to the per-transaction costs of the interstate business. To a lesser degree the same is true of a foreign corporation engaged in local sales. If it gives up this business to escape burdensome taxation, it may reduce operating costs by curtailing office and warehouse expenses, and it may still furnish customers from stock in other states. But the abandonment of mining or manufacturing in the state will seriously affect the interstate business of the company.

It is worthy of note that in two of the cases following the Western Union Case[159] the Supreme Court has called attention to the practical distinction between excise taxes measured by property or capital stock and those measured by receipts.[160] When the tax

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dinances impose specific taxes, or measure their exactions by the number of miles of wire or the number of poles within the municipal limits, though these facilities are used for interstate as well as for local commerce. It seems to be settled that the fact that the local business is unremunerative does not render it immune from taxation. Williams *v.* Talladega, 226 U. S. 404, 416–17, 33 Sup. Ct. Rep. 116 (1912). This case involved a specific tax of $100. The tax was held invalid because the ordinance made its payment a prerequisite to doing any business whatever, but the court declared that it would have been valid if imposed only on local business exclusive of that done for the federal government. It is also to be anticipated that specific taxes on occupations must either be negligible in amount, or must bear some reasonable relation to the value of the business subject to taxation. Some of these occupation taxes can doubtless be saved by being regarded as taxes on intangible property. In this case they may be measured in part by receipts from interstate commerce. Adams Express Co. *v.* Kentucky, note 166, *infra.*

[158] Note 85, *supra.*

[159] Note 4, *supra.*

[160] St. Louis S. W. R. Co. *v.* Arkansas, 235 U. S. 350, 363–64, 35 Sup. Ct. Rep. 99 (1914): "The tax, as will be observed, is not in any wise based upon the receipts of the company from interstate commerce, either taken alone or in connection with the receipts from its intra-state business. Since, therefore, the amount of the imposition is not made to fluctuate with the volume or the value of the business done, we are

is measured by property or by capital stock, it is not increased by an increase in the volume of interstate commerce. When the tax is measured by receipts, it is increased by an increase in the volume of interstate commerce. The economic result of this increase of taxation dependent upon an increase of interstate commerce is to increase *pro tanto* the cost to the corporation of conducting interstate commerce. This is exactly the kind of burden which the states are forbidden to impose directly and which the Western Union Case forbids them to impose by indirection. The only practical difference between the direct and the indirect approach to the receipts would seem to be that, to block the indirect approach, it might be required to appear that the abandonment of the enterprise on which the tax is levied would materially injure the enterprises which afford the receipts by which the amount of the tax is in part determined.

From the aspect of the effect on interstate commerce of a withdrawal from local business in order to escape the tax on that business, mining and manufacturing are more closely akin to transportation than is the business of local sales. Interstate sales of West Virginia products must cease if West Virginia mills and mines close down. The abandonment of the domestic business would involve a serious diminution in the value of the property devoted to such business in the state, since its earning power is enhanced by the fact that the business of shipping across state lines is united with the business of mining and manufacturing. Much of the business of the country is most economically conducted by corporations which combine manufacturing with shipping across state lines. No state tax should be allowed which would require corporations, in order to escape from burdens on interstate commerce, to divorce the ownership and management of different kinds of business which cannot be practically or economically separated in fact.

The requirement of such separation, or the alternative of submission to a tax which is a burden on interstate commerce, cannot be regarded solely from the standpoint of the corporation which

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relieved from those difficulties that arise where state taxes are based upon the earnings of interstate carriers, . . ."

See also the passage quoted from Kansas City, F. S. & M. R. Co. *v.* Botkin, 240 U. S. 227, 335, 36 Sup. Ct. Rep. 261 (1916), in 31 Harv. L. Rev. 598.

unites the business of interstate sales with that of manufacturing. It must be regarded also from the standpoint of the consumers in other states, since the effect of burdening the interstate commerce of the corporations would be to increase the cost to consumers. The combination of these different businesses may, it is true, give interstate corporations power for evil as well as for good. But the prevention of the evil is for Congress and not for the states. And if interstate corporations do not bear their fair share of the tax burden, this too is for Congress to remedy rather than for the states.

If the interests of the corporations were all that were in issue, West Virginia might urge with force some of the distinctions between mining and manufacturing on the one hand, and transportation on the other. As the transportation business is necessarily conducted, the same property is used for both interstate and domestic commerce, but the receipts can be attributed respectively to each kind of commerce. In the case of mining and manufacturing companies which ship their products across state lines, the property itself, with the exception of that part devoted to office purposes, is employed only for local business. Moreover, since all receipts come from sales, the company, by making no sales within the state, may so conduct its business that there are no receipts from local business, even though such business contributes mainly to the earnings. The state might therefore urge that the corporation, since it chooses to combine local business in such a way that no receipts are allocated to the local business, cannot complain that the only method of measuring an excise tax by receipts must necessarily include within the measure receipts from interstate commerce.

There would be great force in this contention, if the state, in losing the power to measure the excise by receipts, were debarred from any legitimate revenue. But the result of denying to the state the power to measure its excise tax on local business by reference to receipts is still to leave open to the state the adoption of a measure which regards as a basis the proportion of capital stock represented by property within the state,[161] or which regards the total capital stock, provided there is a satisfactory limit set

[161] St. Louis S. W. R. Co. *v.* Arkansas, note 160, *supra.*

to the maximum imposition.[162] And excises on corporations engaged in mining and manufacturing might also be measured by the actual value of the products extracted or created within the state. This power of the state was specifically sanctioned in *Missouri K. & T. Ry. Co.* v. *Meyer*.[163] The complaining interstate railroad in that case protested against an Oklahoma excise on persons or corporations engaged in mining within the state, on the ground that the coal mined by said railroad was not sold but was used by it for its locomotives engaged in interstate commerce. In dismissing the contention the court said:

"The coal produced from mines by the plaintiff first has its *situs*, and the production occurs, wholly within the state. If the tax should be regarded as levied upon property, it would not be objectionable on account of its use in interstate commerce. But if it was levied upon the production of the coal, it cannot be held invalid as a restraint or burden upon interstate commerce, because it attaches in advance of any use of the coal in such commerce, and it is too indirect in its effect thereon." [164]

Certainly the mining operations were taxable. The same is true of manufacturing operations within the state. If the state measures its exaction by the fruits of the mining or manufacturing, without seeking to tap the profits attributable to the commercial transactions of making sales for delivery in other states, no objections can be raised. But the state goes beyond this when it adopts the measure of total receipts. Though the books of a

[162] Baltic Mining Co. *v.* Massachusetts, note 8, *supra;* Lusk *v.* Botkin, note 15, *supra.*

[163] 204 Fed. 140 (1913).

[164] 204 Fed. 140, 144 (1913). Another point in the decision is interesting in view of the situation created by the recent assumption of federal control over the railroads. Some of the mines from which the coal was taken were owned by Indian tribes. The railroad leased the same, paying royalties for their use and conducting its operations under the supervision and direction of the Secretary of the Interior. Judge Cotteral observed that, "if this tax were an *ad valorem* tax upon the coal produced from the mines, it would be valid because the exemption adhering to it in the mines would terminate on its removal, upon the general principle that taxation of property is valid after the status which exempts it no longer exists." But the tax was said to be not upon property but upon the pursuit of mining. "If the tax be sustained," continued the court, "it seems clear it might be extended by legislation to the limit of depriving the leases of all value, and of frustrating the exercise of the federal power." The question to be settled was said to be "whether the tax is sufficiently direct in its bearing upon the leases to bring it into conflict with such agency." Without adducing specific argument, the court found the bearing of the tax on the federal agency to be sufficiently direct to require its collection to be enjoined.

corporation may not indicate what is made from mining or manufacturing, and what from the succeeding sales, the two stages are separable; and some estimate may be made of the proportion of the total returns to be allocated to the extractive or creative process. This estimate had to be made in *Missouri K. & T. Ry. Co.* v. *Meyer*,[165] where the producer was also the consumer. When a corporation unites the business of mining or manufacturing with that of making sales in other states, the activities without the state must usually enable it to get more for its product than what that product would bring if sold at the mill or mine. Unless some deduction is made from the receipts from sales to purchasers in other states, the state in which manufacture takes place is taking toll from interstate commerce.[166]

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[165] Note 163, *supra.*

[166] In considering whether taxes on franchises of foreign corporations may be measured in whole or in part by receipts from interstate commerce, a distinction must be drawn between a franchise to act as a corporation, and what is commonly termed a "special franchise" to occupy the public streets, which is possessed by corporations engaged in some form of transportation or communication. Such so-called special franchises are property. Owensboro *v.* Cumberland Teleph. & Teleg. Co., 230 U. S. 58, 33 Sup. Ct. Rep. 988 (1913); Boise Artesian H. & C. Water Co. *v.* Boise City, 230 U. S. 84, 33 Sup. Ct. Rep. 997 (1913). It would seem, therefore, that in assessing their value for purposes of taxation, account may be taken, under the doctrine of United States Express Co. *v.* Minnesota, 223 U. S. 335, 32 Sup. Ct. Rep. 211 (1912), of the total receipts to which their enjoyment gives rise, including receipts from interstate commerce. Such has been the decision of several state courts. Phillipsburg Horse Car R. Co. *v.* State Board of Assessors, 82 N. J. L. 49, 81 Atl. 1121 (1911); State *v.* Wells, Fargo & Co., 38 Nev. 505, 150 Pac. 836 (1915); Illinois Cent. R. Co. *v.* Mississippi Railroad Commission (D. C. S. D. Miss.) 229 Fed. 248 (1914), *semble;* People *v.* State Board of Tax Com'rs, 125 N. Y. Supp. 895 (1910); People *ex rel.* Commercial Cable Co. *v.* State Board of Tax Com'rs, 166 N. Y. Supp. 62 (1917); People *ex rel.* N. Y. C. & H. R. R. Co. *v.* Priest, 206 N. Y. 274, 99 N. E. 547 (1912), *semble.* These two last cases hold also that the propriety of determining the receipts deemed to be the product of the special franchise by taking a proportion of receipts earned in various states, depends on the facts in each case. See note 180, *infra.*

The validity of an assessment on these special franchises as property is conditioned of course on the fact that their value is not included in the assessment of other property taxes levied on the corporation. King County, Washington *v.* Northern Pacific Ry. Co., 196 Fed. 323 (1912). See also note 156, *supra.*

State statutes which by their terms seem to impose franchise taxes may be interpreted by the Supreme Court as levying, not "a true franchise tax," but "merely a property tax upon intangible property." Adams Express Co. *v.* Kentucky, 166 U. S. 171, 17 Sup. Ct. Rep. 527 (1897), discussed in Louisville & N. R. Co. *v.* Greene, 244 U. S. 522, 544–45, 37 Sup. Ct. Rep. 683 (1917). This last case, and also Illinois Central R. Co. *v.* Greene, 244 U. S. 555, 37 Sup. Ct. Rep. 697 (1917), consider interesting questions respecting the proper method of determining what proportion of the

The questions raised by the West Virginia statute are most inadequately dealt with in Judge Pritchard's opinion in *Baldwin Tool Works* v. *Blue*.[167] The point in issue was not whether it was "fair" to the corporation to pay a tax measured by its receipts, but whether such a tax was a regulation of interstate commerce. Many taxes which are fair enough, so far as the taxpayer is concerned, are regulations of interstate commerce, and are therefore to be imposed, if at all, by Congress rather than by the states. But there is strong ground to believe that the measure adopted by West Virginia for the tax on corporations doing business in several states was far from fair.

A foreign corporation doing business only in West Virginia could base its objection to the excise under consideration only on the commerce clause. But a corporation doing business in several states might have other grounds on which successful resistance might be placed. It might urge that within the doctrine of Mr. Justice White's opinion in the Western Union Case, West Virginia was in effect taxing property and business beyond the jurisdiction and thus denying it due process of law. It is to be noted that the West Virginia statute declares that "it is the intention of this chapter to assess the tax imposed thereby on the net income . . . arising from business transacted and capital invested in this state." [168] It thus disavows the intention to assess the tax on business not transacted in the state. But in the case of corporations doing business in several states, the statute bases the amount of the tax, not on the income from business actually done within the state, but on a proportion of the total income derived from business in all the states. This proportion is ascertained by applying to that total, the ratio between (1) the assessed value, for purposes of taxation, of the assets and property of the corporation within the state, and (2) the total assessed value of all its assets and property in all the states in which it does business.

The suitability of this ratio for determining what proportion of the receipts from business in all the states arises from business within West Virginia depends upon two assumptions: (1) that the

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total intangible property of a railroad running through several states is to be regarded as located within the taxing state.

[167] Note 146, *supra*.

[168] 240 Fed. 202, 204 (1916). Quoted on page 761, *supra*.

assessed value for purposes of taxation in each state is the same proportion of the actual value of the property in that state; (2) that the earnings from business within each state bear the same ratio to the total earnings in all the states as the actual value of property within the state bears to the actual value of property in all the states.

In the case of certain corporations the first assumption will be found to be opposed to the facts. This is because in some other states the assessment values are not identical with the actual values. In some states, personal property employed in manufacturing is exempt from taxation. In Massachusetts, as Chief Justice Rugg points out in the International Paper Case,[169] a domestic corporation is not taxed locally for its personal property, but such property "is taken into account in ascertaining the value of its franchise upon which it pays an excise tax."[170] The result of such discrepancies between actual and assessed values in other states, while assessments in West Virginia correspond to actual values, is to allow West Virginia to extract additional revenue from the corporation because some other state, for the encouragement of manufacture, exempts certain property, or substitutes some other mode of taxation for *ad valorem* taxes on property.

The assumption that earnings in each state are proportioned to the value of property in that state is likewise unwarranted. This would not necessarily be true if all earnings were the result of the use of property. The property in West Virginia might be unproductive in any given year without reducing in that year its assessed value. An increase in the productivity of property in other states, without a corresponding increase in the productivity of property in West Virginia, would increase the amount of the tax in West Virginia. Since, if West Virginia were allowed to measure its taxation by a proportion of the total earnings in all the states, other states might *a fortiori* measure their taxes by the actual earnings in those states, the receipts taken as the measure of taxation in all the states might be greater than the total actual earnings.

A further vice in the assumption under consideration is that not all the earnings in all the states are the product of the use of property. The earnings from other states may be the fruit of

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[169] Note 97, *supra*. [170] 228 Mass. 101, 114, 117 N. E. 246 (1917).

business unconnected with the use of property. That business may consist entirely of interstate sales. A leasehold interest and a clerical force may be all that is necessary to carry it on. The receipts from such business would be added to the total of which West Virginia fixes a proportion as the measure of its tax, but the absence of any considerable amount of property in states other than West Virginia would make the ratio between property in West Virginia and that in all the states a most inadequate one for the determination of what proportion of the total receipts shall be deemed to be earned from business in West Virginia.

It is clear, therefore, that the ratio applied by West Virginia to total receipts in all the states is little adapted to the professed end of ascertaining the receipts properly attributable to business in West Virginia. Its application to corporations doing business in several states, under the conditions suggested in the three foregoing paragraphs, would result in a more serious burden on interstate commerce than would the selection of the receipts actually derived from business in West Virginia. It would tax such corporations more severely than corporations doing business only in West Virginia, and would therefore penalize the interstate organization of business.

Unless the Supreme Court has abandoned its canon that every decision on the subject under consideration is to be based on the facts of the particular case, such facts in respect to the business and property and taxation of any foreign corporation as indicate that the West Virginia ratio does not serve its professed end, would be material in determining whether the tax was a regulation of interstate commerce or a taking of property without due process of law. And if the Supreme Court has discarded its realistic outlook, it has done so in favor of a rigid formula that any tax which would be invalid, if levied directly on what it is measured by, is invalid although levied on something else properly subject to taxation.

There are no authoritative precedents on the propriety of West Virginia's method of determining the receipts from business within the state for the purpose of measuring the amount of an excise tax, because the recent decisions [171] have denied to the states the power to measure excise taxes by receipts which include receipts

[171] Cases cited in notes 153 and 157, *supra*.

from interstate commerce. The only cases in which reference to receipts which include receipts from interstate commerce has been allowed in determining the amount of a tax imposed by the state, are those in which the state is seeking to value property within the state.[172] In those decisions we find that the court sustains the application of a ratio to a total only when the result may fairly be presumed to measure the actual value of that part of the total which is in the taxing state.

In *Fargo* v. *Hart*,[173] the state of Indiana sought to value the Indiana property of an interstate express company by taking that part of the total value of property in all the states which the mileage over which the company did business in Indiana bore to the total mileage over which the company did business in all the states. On the complaint of the company, the state was not allowed, in fixing the total to which the ratio was to be applied, to include assets of the express company not used in the express business, and which were therefore not properly distributable throughout all the states on a mileage basis. The inclusion of such assets in this total was held to be not merely a case of over-valuation, but an assessment made upon unconstitutional principles and a taxation of property beyond the jurisdiction of the state, and the imposition of an unconstitutional burden on commerce among the states. The following quotation from the opinion of the court shows the principle underlying the decision:

"It is obvious however that this notion of organic unity may be made a means of unlawfully taxing the privilege, or property outside the State, under the name of enhanced value or good will, if it is not closely confined to its true meaning. So long as it fairly may be assumed that the different parts of a line are about equal in value a division by mileage is justifiable. But it is recognized in the cases that if for instance a railroad company had terminals in one State equal in value to all the rest of the line through another, the latter State could not make use of the unity of the road to equalize the value of every mile. That would be taxing property outside of the State under a pretense. *Pittsburg, Cincinnati, Chicago & St. Louis Ry.* v. *Backus*, 154 U. S. 421, 431; *Western Union Telegraph Co.* v. *Taggart*, 163 U. S. 1, 23. The same principle applies to personal property which the State would not have the right

[172] United States Express Co. *v.* Minnesota, note 166, *supra*, and cases cited therein.

[173] 193 U. S. 490, 24 Sup. Ct. Rep. 498 (1904).

to tax directly. *Adams Express Co.* v. *Ohio State Auditor*, 165 U. S. 194, 227; S. C., 166 U. S. 185, 222, 223."[174]

The case of *Fargo* v. *Hart*[175] was quoted with approval in *Meyer* v. *Wells Fargo & Co.*[176] That decision involved an excise tax measured by a proportion of gross receipts. A corporation doing business in several states was required to pay a tax "equal to such proportion of said per centum of its gross receipts as the portion of its business done within the state bears to the whole of its business."[177] There was, however, in the statute a proviso for fixing a different proportion, if it "more fairly represents the proportion which the gross receipts of any such public service corporation for any year within this state bear to its total gross receipts."[178] This proviso was not before the court for consideration, because the reference to receipts was held entirely invalid; but, in considering the possible contention that the tax was to be regarded as a property tax, the court made the following comment:

"The plaintiff's receipts are largely from commerce among the States, and it also receives large sums as income from investments in bonds and land all outside the State of Oklahoma. So that it is evident that if the tax is what it calls itself it is bad on the former ground, and that whatever it is it is bad on the latter. *Fargo* v. *Hart*, 193 U. S. 490. In that case the tax was proportioned to mileage, and it was held that it could not be sustained when, although purporting to be a tax on property, it took into account, in order to increase proportionately the value of the mileage within the State, valuable property outside of it. The same principle would apply to a property tax measuring the total property by the total gross receipts increased by the special outside sources of income and taxing a proportion of this total fixed by the ratio of business within the State to that outside."[179]

In these two decisions the vice in the method of determining what part of the total property or business was within the state, lay in the selection of an excessive total rather than in the selection of an excessive ratio. Manifestly, however, an excessive ratio would have the same vice as an excessive total.[180]

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[174] 193 U. S. 490, 499–500, 24 Sup. Ct. Rep. 498 (1904).

[175] Note 173, *supra*. [176] Note 157, *supra*.

[177] 223 U. S. 298, 299, 32 Sup. Ct. Rep. 328 (1912).

[178] 223 U. S. 298, 299–300, 32 Sup. Ct. Rep. 328 (1912).

[179] 223 U. S. 298, 300, 32 Sup. Ct. Rep. 328 (1912).

[180] A number of cases hold that the taxpayer is not entitled to insist on the application of the mileage ratio to determine what proportion of its total earnings are to be

It may therefore be taken as established that the application of the unit rule for the purpose of determining what part of a total of taxable value in several states may be regarded as within the jurisdiction of the taxing state, is valid only where the relation of the ratio to the total is such that the result may fairly be presumed to represent the taxable value within the state. A complainant is entitled to a diminution of the total or of the ratio, upon proof that the total includes values not properly apportionable in all the states by the ratio selected, or upon proof that the ratio is not a proper method of apportioning the total.

Moreover, it is important to note that, in valuing property, the unit rule is legitimate only where the total property may properly be regarded as a unit. In the case of railroad and telegraph companies, the unit is a unit of physically connected property. In respect to the express business the unit has been declared to be one of "use and management." [181] This is the farthest that the

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taken as the measure of the value of a special franchise to use the highways of the state, when such special franchise is taxed as property. In People *ex rel.* N. Y. C. & H. R. R. Co. *v.* Priest, 206 N. Y. 274, 300, 99 N. E. 547 (1912), the New York court of appeals said:

"Any comparison of track or passenger mileage necessarily spreads the earnings over the mileage, without taking into account the value of a franchise at a particular place to increase the earnings of the system of road with which it is connected. A particular franchise is frequently of important value in connection with a railroad system as a means of obtaining and retaining business."

In People *ex rel.* Commercial Cable Co. *v.* State Board of Tax Com'rs, 166 N. Y. Supp. 62 (1917), the relator thought its franchise in the city of New York should be valued by applying to total earnings the ratio of the mileage in the city to the total mileage, including that of its trans-oceanic cables, but the court thought otherwise. In dismissing the contention, Judge Pendleton said:

"Where the mileage of the telegraph lines, within the city, is small as compared with the total mileage, but the terminal property in the city is the means of reaching the central point, from which business emanates and to which it converges, a comparison of the mileage of the special franchise with the total mileage cannot in the nature of things be an accurate basis for determining what proportion of the total net earnings should be allocated to the terminal property."

It is plain that in many cases a mileage ratio or a ratio of assessed value of property will be inept for determining what proportion of total receipts earned in several states shall be taken as the earnings within one of those states. The mileage or the property in one state may be more or less productive than the same amount of mileage or property in another state. It seems clear from the decisions, that neither the state nor the taxpayer can insist on some arbitrary ratio which can be shown to be in fact ill-adapted to the professed purpose in hand. See West Shore R. Co. *v.* State Board of Assessors, 82 N. J. L. 37, 81 Alt. 351 (1916).

[181] Adams Express Co. *v.* Ohio, 165 U. S. 194, 222, 17 Sup. Ct. Rep. 305 (1897).

court has gone in sustaining the application of the unit rule to the valuation of property. It would be going still farther to apply the unit rule to a corporation not doing the same kind of business in all the states in which it operates. The cases which require a modification of the unit rule in valuing property, require at the least an analogous modification in valuing a privilege granted to a corporation by one state which is essentially different in respect to the kind of business and its income-producing power than are the privileges granted to the same corporation in other states.

V

From the foregoing review, it appears that, in the interim between the Baltic Case [182] and the Looney Case,[183] the power of a state to measure excises on foreign corporations by their total capital stock has been considered by the courts of Montana,[184] California,[185] Massachusetts,[186] Tennessee,[187] and Virginia.[188] Only the Montana court saw any impropriety in applying this measure to corporations combining some form of interstate commerce, other than transportation or communication, with the local business which made the corporation subject to the taxing power of the state.[189] By

[182] Note 8, *supra.*

[183] Note 13, *supra.*

[184] In State *v.* Alderson, note 23, *supra.*

[185] In Albert Pick & Co. *v.* Jordan, note 45, *supra.*

[186] In International Paper Co. *v.* Commonwealth, note 97, *supra.*

[187] In Atlas Power Co. *v.* Goodloe, note 130, *supra.*

[188] In General Ry. Signal Co. *v.* Commonwealth, note 138, *supra.*

[189] The decision of the federal district court of the northern district of Texas in Crane Co. *v.* Looney, 218 Fed. 260 (1914), does not appear to except that court from the above statement. The opinion indicates that the court would have made the Crane Co. pay the Texas tax if it had been based simply on total capital stock, without the inclusion of its surplus and other assets in excess of its authorized capital. In distinguishing the Baltic Case, Judge Meek made no mention of the maximum contained in the Massachusetts statute. The distinction made is as follows:

"The case of the Baltic Mining Company, cited *supra*, was not one in which there was any such necessary relation between the amount of the excise charge and the amount or value of the corporation's property outside of the state or of its interstate or foreign business. The charge imposed by the statute there in question was measured by the amount of the par value of its authorized capital, without regard to the actual value of its assets, whether more or less than that of its nominal capital stock. The charge was not measured by the amount or value of the corporation's assets or the extent of its actual business anywhere or of any kind. The terms of the statute made the charge the same, whether the actual value of the assets of the corporation was more

way of advice to the legislature, the Montana court declared that the statute of that state could not be applied to any foreign corporation engaged in any kind of interstate commerce. It intimated also that it would not help matters to amend the statute and set a reasonable maximum to the annual imposition. In this it clearly misconceived the decision of the Supreme Court in the Baltic Case. The courts of California, Massachusetts, Tennessee, and Virginia went to the opposite extreme, and declared that no maximum was necessary. The supreme court of Idaho[190] took the middle position. In upholding the tax which came before it, it gave as a reason the fact that the Idaho statute provided that no corporation should be required to pay more than $150. It implied that if the maximum were not kept reasonably low, the statute would be invalid.

The California case involved a corporation whose business within the state consisted of local and interstate sales of products manufactured in other states. The similarity between this business and that of the Crane Company in *Looney* v. *Crane Co.*[191] makes it certain that, on writ of error, the judgment of the California court would be reversed by the United States Supreme Court. Whether a similar fate would befall the judgments of the Massachusetts, Tennessee, and Virginia courts would depend upon whether the Supreme Court could be persuaded that excises on foreign corporations engaged in non-commercial activities within the state may be measured in ways that are vain when chosen for corporations engaged exclusively in what the law calls commerce.

The West Virginia statute which came before the federal district court in *Baldwin Tool Works* v. *Blue*[192] adopted the measure of receipts rather than of capital stock. It professed to look only to receipts derived from business done within the state. It did not, however, exclude receipts from interstate commerce carried

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or less than the amount of the par value of its authorized capital stock, and whatever may have been the nature or extent of the business in which it was engaged."

The United States Supreme Court in sustaining the lower court gave no indication that it sanctioned any such distinction, or that it would have decided differently had the Texas statute excluded from consideration all assets in excess of the authorized capital. See 31 HARV. L. REV. 603–04, 614–15.

[190] In Northern Pacific Railway Co. *v.* Gifford, note 69, *supra.*

[191] Note 13, *supra.*

[192] Note 146, *supra.*

on within the state. Such receipts are not taxable directly. They may, however, be made the basis for the valuation of property within the state,[193] or for the assessment of taxes wholly[194] or partially[195] in lieu of taxes on property. On the question whether they may be made the measure of taxes on a privilege extended to a foreign corporation, the Supreme Court has not explicitly declared itself subsequent to its abandonment of its earlier doctrine that privileges within the power of the state to withhold may be taxed as the state may please.

Looney v. *Crane Co.*,[196] however, made it clear that a state must show good cause why it should be allowed to measure any tax, other than a property tax, by elements that cannot be levied on directly. The only cause that has been accepted as sufficient for taxes on foreign corporations is the inclusion in the statute of a reasonable maximum.[197] Such a provision really makes the tax a specific one, with a sliding discount in favor of corporations of little capital. Only in the case of such smaller corporations is the tax measured by their total capital stock. If the maximum is no more than the amount which might be imposed as a flat charge on all seeking admission for domestic business, the reference to total capital stock may be regarded as an act of grace towards those who can benefit from it. The sanction given by the Supreme Court to the Massachusetts statute applied in the Baltic Case[198] is grounded on considerations which have no bearing on taxes measured by receipts from interstate commerce, or on taxes measured by total capital stock and imposed on corporations whose interstate commerce is conducted in connection with local manufacturing rather than with local sales.

The Looney Case[199] indicates that the Supreme Court is working towards a more definite rule than any which could be inferred from its earlier decisions following the Western Union Case.[200] That definite rule promises to be one to the effect that only by setting a reasonable limit to its annual imposition may a state measure taxes on foreign corporations engaged partly in interstate

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[193] Adams Express Co. *v.* Ohio, note 181, *supra.* On rehearing, 166 U. S. 185, 17 Sup. Ct. 604 (1897).

[194] United States Express Co. *v.* Minnesota, note 166, *supra.*

[195] Maine *v.* Grand Trunk Railway Co., note 3, *supra*, as interpreted in Galveston, H. & S. A. Ry. Co. *v.* Texas, note 153, *supra.*

[196] Note 13, *supra.*

[197] Baltic Mining Co. *v.* Massachusetts, note 8, *supra.*

[198] Note 8, *supra.*

[199] Note 13, *supra.*

[200] Note 4, *supra.*

commerce, by any elements that are immune from a direct levy. The only indefiniteness lurking in this definite rule arises from the question of what limits will be regarded as reasonable, and the further question whether the limits may be graduated in accordance with the size of the corporation. There is good reason to believe that the statutes sustained and applied by the federal court in West Virginia, and by the state courts of California, Massachusetts, Tennessee, and Virginia, will be discountenanced by the United States Supreme Court. The states have had clear warning of the risks they run in imposing on foreign corporations excises that seek by indirection to reach the fruits of interstate commerce or to enjoy an increment by reason of property or business in other states.

The possibility that the Supreme Court will disapprove of the state decisions under review suggests interesting questions with respect to the practical operation of our federal system. Until some perservering litigant carries its case from the state court to the federal Supreme Court, the states may continue to do what the Supreme Court would restrain. The law that many foreign corporations live by may be quite different from the law that the Supreme Court would declare. It would be interesting to know how many foreign corporations have paid their taxes under the statutes of California, Massachusetts, Tennessee, Texas, Virginia, and West Virginia, without appealing to the courts for relief. It would be interesting to know how many successful objectors to taxation escape from legitimate demands of the states, because the legitimate demand is inseparable from what is declared invalid. Our method of testing the conformity of state legislation to the requirements of the federal Constitution is often cumbrous in its operation. Successful resistance to state laws often costs more than acquiescence. The expense of settling questions of general public concern has to be borne by individual litigants. The system works well enough for those who are interested only in the evolution of constitutional doctrine. But it is not unthinkable that some day we may devise improvements that will meet the objections which might be raised by those who are concerned primarily with results.

(To be continued)

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INDIRECT ENCROACHMENT ON FEDERAL AUTHORITY BY THE TAXING POWERS OF THE STATES.[1] IV

II. Regulations of Interstate Commerce (*continued*)

2. *Taxes not Discriminating against Interstate Commerce* (continued)

A. Taxes on Privileges (*concluded*)

(*d*) *Recent Supreme Court Decisions on California and Massachusetts Statutes*

IN the preceding installment of this discussion it was said that the similarity between the business of the complainants in the California case of *Albert Pick & Co.* v. *Jordan*[2] "and that of the Crane Company in *Looney* v. *Crane Co.*[3] makes it certain that, on writ of error, the judgment of the California court would be reversed by the United States Supreme Court."[4] This venturesome prediction was made in ignorance of the fact that on June 4, 1917, the judgment of the California court had been affirmed by the Supreme Court.[5] Benevolent readers may find some excuse for this oversight in the circumstance that the Supreme Court wrote no opinion, and therefore its decision did not find its way into the digests.[6] More justification, however, is necessary for the error in judgment.

The opinion of the California court, by Judge Henshaw, did not

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[1] For preceding installments of this discussion see 31 Harv. L. Rev. 321–72 (January, 1918), *Ibid.*, 572–618 (February, 1918) and *Ibid.*, 721–78 (March, 1918).

[2] 169 Cal. 1, 145 Pac. 506 (1915).

[3] 245 U. S. 178, 38 Sup. Ct. Rep. 85 (1917).

[4] 31 Harv. L. Rev. 776.

[5] Albert Pick & Co. *v.* Jordan, 244 U. S. 647, 37 Sup. Ct. Rep. 741 (1917).

[6] Malevolent readers will be glad to know that the decision came to the writer's attention through no diligence of his own, but through the fact that it was cited in the brief for the Commonwealth in International Paper Co. *v.* Massachusetts, 38 Sup. Ct. Rep. 292 (1918), a copy of which was furnished him through the courtesy of Wm. Harold Hitchcock, Assistant Attorney General of Massachusetts, who prepared and argued the cases for the Commonwealth discussed in this article.

recite the provisions of the statutes under which the excises in issue were levied. It referred to "the annual corporation license-tax" as one "founded on the total capital stock";[7] it pointed out that the Western Union Company, if it had undertaken to do business in California, would have been compelled to pay a fee of $10,000 for filing with the Secretary of State a copy of its charter as it was required to do, in addition to an annual license tax of $250;[8] and it saw no significance in the fact that the Massachusetts tax sustained in *Baltic Mining Co.* v. *Massachusetts*[9] was by statute limited to $2,000.[10] No mention was made of any provision in the California statute prescribing a maximum which the imposition should not exceed. The opinion proceeded on a theory quite inconsistent with that announced by the Supreme Court in *Looney* v. *Crane Co.*[11]

The Supreme Court, in affirming the judgment of the California court, contented itself with filing the following memorandum opinion:

"June 4, 1917. Per Curiam: Judgment affirmed with costs, upon the authority of Kansas City, Ft. S. & M. R. Co. *v.* Botkin, 240 U. S. 227, 60 L. Ed. 617, 36 Sup. Ct. Rep. 261."[12]

The Botkin Case thus relied upon by the Supreme Court involved the Kansas statute as amended following the decision of *Western Union Telegraph Co.* v. *Kansas*.[13] The amended statute limited the annual imposition to $2,500. Moreover the complainant in the Botkin Case was a domestic corporation. The complainant in *Albert Pick & Co.* v. *Jordan*[14] was an Illinois corporation resisting a California tax. *Kansas City, M. & B. R. Co.* v. *Stiles*,[15] decided on December 4, 1916, had made it clear that a domestic corporation could be subjected to a tax which the Western Union Case had declared could not be imposed on a foreign corporation, and

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[7] Albert Pick & Co. *v.* Jordan, 169 Cal. 1, 14, 145 Pac. 506 (1915).
[8] *Ibid.*, 169 Cal. 1, 13, 145 Pac. 506 (1915).
[9] 231 U. S. 68, 34 Sup. Ct. Rep. 15 (1913).
[10] Albert Pick & Co. *v.* Jordan, 169 Cal. 1, 18, 145 Pac. 506 (1915).
[11] Note 3, *supra*.
[12] Note 5, *supra*.
[13] 216 U. S. 1, 30 Sup. Ct. Rep. 190 (1910).
[14] Notes 2 and 5, *supra*.
[15] 242 U. S. 111, 37 Sup. Ct. Rep. 56 (1916). See 31 HARV. L. REV. 599–600.

thus had made inapplicable to controversies respecting foreign corporations, precedents sustaining identical taxes on domestic corporations. Clearly then the Supreme Court was not justified in asserting that the Botkin Case [16] answered the contentions of the complainant in the Pick Case,[17] unless Pick and Company were a domestic corporation, and unless in addition the excises of which it complained were levied under statutes which set some limit to the amount which might be charged.

It is conceivable that on June 4, 1917, when the Pick Case was decided, the Supreme Court was of the opinion that foreign corporations not engaged in transportation were subject to any exactions which might be imposed on domestic corporations. But even then, if it was aware that the California exaction was measured by total capital stock with no maximum limitation, it should have rested the Pick Case on the authority of the Stiles Case [18] rather than the Botkin Case.[19] And if on June 4, 1917, the Supreme Court harbored the idea that foreign corporations not engaged in transportation might be subjected to taxes measured by total capital stock, that idea was definitely cast out on December 10, 1917, when *Looney* v. *Crane Co.*[20] was decided.

It is doubtless true, however, that the Kansas tax involved in *Kansas City, Ft. S. & M. R. Co.* v. *Botkin* [21] might be exacted from a foreign corporation. But this is because Kansas set a fixed limit to its demands, however large the capital of the corporation. In citing the Botkin Case as conclusive of the point at issue in the Pick Case, the Supreme Court must therefore have thought either that the California statutes limited the exactions which might be imposed thereunder, or else that the absence of such a limit was immaterial. The latter hypothesis seems inconsistent with *Looney* v. *Crane Co.*[22] But it may not be, as will be pointed out later.

If the Supreme Court thought that the California exaction was limited in amount, however large the capital of the corporation in question, it was in error. The Pick Case originated in a petition by the foreign corporation for a mandate against the secretary of state, directing him to accept and file certain papers without pay-

[16] 240 U. S. 227, 36 Sup. Ct. Rep. 261 (1916).

[17] Note 5, *supra*.

[18] Note 15, *supra*.

[19] Note 16, *supra*.

[20] Note 3, *supra*.

[21] Note 16, *supra*.

[22] Note 3, *supra*.

ment of the fee exacted by subdivision 4 of section 409 of the Political Code, or of the corporation license tax of 1905. The annual license tax was limited in amount. It began at $10 for corporations with capital of $10,000 or less, and rose to $200 for corporations with capital not exceeding $5,000,000. But all corporations having a capital in excess of $5,000,000 paid only $250, however large their capital.[23] But the fees to be paid for filing with the secretary of state a copy of the corporate charter increased indefinitely, and the filing of the charter and payment of the fee were conditions prerequisite to the right to do local business within the state. Corporations with a capital between $500,000 and $1,000,000 had to pay $100. If the capital stock exceeded $1,000,000, the statute called for "$50 additional for every $500,000 or fraction thereof of capital stock over and above $1,000,000." [24] Thus corporations had to pay $100 for every $1,000,000 of capital stock. As was stated in the opinion of the California court, the Western Union Telegraph Company under this statute would have been compelled to pay $10,000 in California, as against the $20,100 which it had to pay under the Kansas statute involved in *Western Union Telegraph Co.* v. *Kansas*.[25]

Thus one of the statutes complained of by Albert Pick and Company imposed a fee graduated according to capital stock, with no maximum limit. This fee, however, under the terms of the statute had to be paid but once. On this ground the statute might be distinguished from the Texas statute in *Looney* v. *Crane Co.*[26] which called for recurrent payments each decade. But to sanction such a distinction would do violence to *Western Union Telegraph Co.* v. *Kansas*,[27] since the Kansas statute there involved called only for a single payment for filing a copy of the corporate charter. A provision in the Kansas statute to the effect that any corporation applying for a renewal of its charter should comply with the act to the same extent as provided for the chartering and organizing of new corporations, was not referred to in the opinion

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[23] The statutory provision for the annual license fee is quoted in H. K. Mulford Co. *v.* Curry, 163 Cal. 276, 279–80, 125 Pac. 236 (1912).

[24] The statutory provision for the filing fee is quoted in H. K. Mulford Co. *v.* Curry, 163 Cal. 276, 279, 125 Pac. 236 (1912).

[25] Note 13, *supra.*

[26] Note 3, *supra.*

[27] Note 13, *supra.*

of the court and seems to be drawn to apply to domestic rather than to foreign corporations. It would seem therefore that the Western Union Case held squarely that a fee for filing a copy of the corporate charter could not be demanded even once, if it was measured by the total capital stock, with no maximum limit.

It is not to be lightly assumed that the Supreme Court in affirming the California judgment without opinion meant to depart from this prior ruling. No objection can be raised to the affirmance of the judgment, for the petitioner sought to compel the filing of its papers without paying either the filing fee or the annual license tax. The latter was properly demanded by the state, since its amount was limited to $250. The petitioner, therefore, was not entitled to judgment on its demurrer to the answer of the secretary of state. But the opinion of the state court had sanctioned the requirement of the unlimited filing fee as well as of the limited annual license fee. The Supreme Court, therefore, in affirming the judgment below, without rendering an opinion, has given the California court reason to believe that its opinion as well as its decision was warranted. The Supreme Court has thus left a loophole for further controversy, which might have been closed by an opinion indicating the specific grounds on which it sustained the court below.

The filing fee demanded of the petitioner was only $100, as its capital did not exceed $1,000,000. Such a fee is a moderate one to exact from a corporation of any size, particularly if it is to be demanded only once. As a specific charge it would seem not open to question. But the Supreme Court seems to have regarded a fee assessed on a vicious basis as thoroughly tainted by its associations, even though in other company or as a specific charge it would be deemed without fault. The inference, then, that the Supreme Court in sustaining the California court in the Pick Case[28] deliberately sanctioned the measure adopted by the California statute for fixing the amount of the filing fee, cannot be accepted. The only grounds on which such sanction could be legi-

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[28] It is of course possible that, as the Pick Case was presented to the Supreme Court, the objection to paying the $100 filing fee was not urged. But as the record is presented by the statutes, the opinion of the California court, and the memorandum opinion of the Supreme Court, there is nothing to show that the issues presented to the Supreme Court differed from those passed upon by the state court.

timately based are inconsistent with the implications to be drawn from the combination of the Western Union Case with the case of *Locomobile Co. of America* v. *Massachusetts*.[29] The former stands for the ruling that a single charter fee is subject to the same restrictions as an annual license fee. The latter holds that a corporation may complain of the removal of the statutory maximum limit to the annual imposition, even though the presence or absence of such limit does not affect the amount demanded from it.

The Locomobile Case[30] was one of three decisions handed down by the Supreme Court on March 4, 1918. All three involved the exactions required of foreign corporations by the Commonwealth of Massachusetts. *Cheney Brothers Co.* v. *Massachusetts*[31] dealt with the Massachusetts statute of 1909 which had been applied in *Baltic Mining Co.* v. *Massachusetts*.[32] The complaining corporations were those against whom judgments were rendered by the Supreme Court of the Commonwealth in *Marconi Wireless Telegraph Co.* v. *Commonwealth*,[33] considered in the previous installment of this discussion.[34] The judgments of the court below were sustained, with the single exception of that rendered against the Cheney Brothers Company.

The issue presented to the Supreme Court was whether the several corporations were engaged in local commerce which was separate and distinct from their interstate commerce. The Cheney Brothers Company kept no stock of goods in Massachusetts. Its Boston office was headquarters for salesmen, and samples were kept there. All orders obtained by salesmen in Massachusetts were subject to approval by the home office in Connecticut, and were filled from stock kept outside of Massachusetts. Collections were made from the home office in Connecticut, and from that office were paid the salaries of the Massachusetts salesmen and the rent of the Boston office. The Supreme Court held that there was nothing done in Massachusetts "that can be regarded as a local business as distinguished from interstate commerce."[35] The

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[29] 38 Sup. Ct. Rep. 298 (1918).

[30] Note 29, *supra*.

[31] 38 Sup. Ct. Rep. 298 (1918).

[32] Note 9, *supra*.

[33] 218 Mass. 558, 106 N. E. 310 (1914).

[34] 31 Harv. L. Rev. 741–45 (March, 1918).

[35] 38 Sup. Ct. Rep. 295, 296 (1918).

display of samples in Boston was said to be merely a means for carrying on interstate commerce. The inference or assumption relied on by the state court, to the effect that Massachusetts salesmen took some orders from Connecticut purchasers which were filled from the Connecticut mill, was said not to give any warrant to Massachusetts to tax the corporation, on the ground that it was engaged in local as well as interstate business. "In such cases," said Mr. Justice Van Devanter, "it is doubtless true that the resulting sale is local to Connecticut, but the action of the Boston office in receiving the order and transmitting it to the home office partakes more of the nature of interstate intercourse than of business local to Massachusetts and affords no basis for an excise tax in that state." [36]

Among the corporations held subject to the excise tax was the Locomobile Company of America, a West Virginia corporation manufacturing automobiles in Connecticut, and doing in Massachusetts, in addition to interstate commerce, "an extensive local business . . . in repairing cars of its own make and use, and also in selling second-hand cars taken in partial exchange for new ones." [37] The excise in question was levied under the Act of 1909, which fixed the amount by taking one-fiftieth of one per cent of the total capital stock until the tax amounted to $2,000. A simple computation will reveal that the only corporations which could derive any benefit from this provision for a maximum are those whose capital is in excess of $10,000,000. In 1913, when the excise was levied, the Locomobile Company had a capital of $5,000,000, and the tax of $1,000 demanded from it was in no way affected as to its amount by the provision in the statute that no tax should exceed $2,000.

In 1914 Massachusttes passed the following statute:

"Every foreign corporation subject to the tax imposed by section fifty-six of Part III of chapter four hundred and ninety of the acts of the year nineteen hundred and nine shall in each year, at the time of filing its annual certificate of condition, pay to the treasurer and receiver general for the use of the commonwealth, in addition to the tax imposed by said section fifty-six, an excise tax to be assessed by the tax commissioner of one one-hundredth of one per cent of the par value of its author-

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[36] 38 Sup. Ct. Rep. 295, 296 (1918).

[37] 38 Sup. Ct. Rep. 295, 297 (1918).

ized capital stock in excess of ten million dollars as stated in its annual certificate of condition." [38]

The section fifty-six referred to was the provision applied to the Locomobile Company in the Cheney Brothers Case.[39] Inasmuch as the measure adopted for assessing the excise exacted by the Act of 1914 was the amount which the capital stock exceeded $10,000,000, the Locomobile Company, though belonging to the class of corporations required by the Act of 1914 to pay the additional excise, did not come within the clutches of the measure by which the amount of the tax was determined. The Act of 1914 could not, therefore, operate in any way to the disadvantage of the Locomobile Company, unless during the preceding year its capital stock had more than doubled.

No such doubling had taken place. The authorized capital had been increased from $5,000,000 to $6,500,000, so that the excise assessed in 1915 was $300 larger than that assessed in 1913. But the Locomobile Company was still $3,500,000 away from the fangs of the Massachusetts statute of 1914. The Supreme Court of Massachusetts sustained the $1,300 tax of 1915 [40] on the au-

[38] St. 1914, c. 724, 1. The section is quoted in International Paper Co. *v.* Massachusetts, 38 Sup. Ct. Rep. 292 (1918).

[39] Note 31, *supra*. The section is quoted in International Paper Co. *v.* Massachusetts, 38 Sup. Ct. Rep. 292, 293 (1918). It reads as follows:

"Every foreign corporation shall, in each year, at the time of filing its annual certificate of condition, pay to the treasurer and receiver general, for the use of the Commonwealth, an excise tax to be assessed by the tax commissioner of one fiftieth of one per cent of the par value of its authorized capital stock as stated in its annual certificate of condition; but the amount of such excise tax shall not in any one year exceed the sum of two thousand dollars." Before the enactment of the Act of 1914, the Act of 1909 had been limited in respect to the corporations to which it is applicable by the decision of the Supreme Court of Massachusetts in Attorney General *ex rel.* Commissioner of Corporations *v.* Electric Storage Battery Co., 188 Mass. 239, 74 N. E. 467 (1905). The interpretation of the state court was summarized by the Supreme Court of the United States in Baltic Mining Co. *v.* Massachusetts, 231 U. S. 68, 84, 34 Sup. Ct. Rep. 15 (1913), as follows:

"Construing the act in question, the supreme judicial court of Massachusetts has held that it does not apply to corporations engaged in railroad, telegraph, telephone, etc., business, which are taxed on another plan under the provisions of the statute. It is held not to apply to corporations whose business is interstate commerce, or who carry on interstate and intrastate business in such close connection that the intrastate business cannot be abandoned without serious impairment of the interstate business of the corporation. And the statute, it is held, does not apply to corporations which have places of business for the transaction solely of interstate commerce."

[40] Locomobile Company of America *v.* Commonwealth, 228 Mass. 117, 117 N. E. 5 (1917).

thority of *Baltic Mining Co.* v. *Massachusetts*.[41] Chief Justice Rugg, in the concluding sentence of the opinion, observed: "Since no part of the excise here challenged was levied under the terms of St. 1914, c. 724, that statute need not be considered."[42]

But the Supreme Court of the United States took a different view. Mr. Justice Van Devanter declared that the "tax is of a designated per centum of the entire authorized capital, and was imposed after the maximum limit named in St. 1909, c. 490, Part III, § 56, was removed by St. 1914, c. 724, § 1."[43] He held therefore that "as thus changed the statute is in its essence and practical operation indistinguishable from those adjudged invalid in *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1; *Pullman Co.* v. *Kansas*, 216 U. S. 56; *Ludwig* v. *Western Union Telegraph Co.*, 216 U. S. 146, and *Looney* v. *Crane Co.*, 245 U. S. 178."[44]

This construction of the Massachusetts excise system was possible only because the $2,000 maximum in the Act of 1909 afforded no protection to a corporation whose capital was less than $10,000,000, and because the Act of 1914 imposed an additional unlimited excess measured by capital in excess of that amount. There was no hiatus between the two taxes. The second took hold where the first let go. It was therefore good realism to insist that the second removed the maximum limit contained in the first. Massachusetts after 1914 had a taxing system which made the excises on foreign corporations increase indefinitely *pari passu* with increase of their capital stock. The practical result would have been the same had the Act of 1914 designated as the corporations subject to its demands, not those named in the Act of 1909, but only corporations having a capital in excess of $10,000,000. It would have been substantially the same had the class been designated as those corporations having a capital in excess of $10,100,000, or had the maximum in the Act of 1909 been lowered to $1,900. Either of these devices would have created a gap between the two demands of the state. But such lacunæ might well be disregarded on the principle of *de minimis non curat lex*. A steadily growing corporation would find in them too brief a respite.

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[41] Note 9, *supra*.

[42] 228 Mass. 117, 122, 117 N. E. 5 (1917).

[43] Locomobile Company of America *v.* Massachusetts, 38 Sup. Ct. Rep. 298 (1918).

[44] *Ibid.*

We must concede that it was a sensible practical judgment which characterized the Massachusetts tax as one based on total capital stock, with no maximum limitation. Yet the situation resulting from the two contemporaneous decisions of the Supreme Court, in both of which the Locomobile Company was a complainant, exhales an atmosphere of artificiality. On the very same day the court sustains one excise measured by the total capital stock of the Locomobile Company, and declares invalid another whose amount is determined by the identical measure so far as the complainant was concerned. Both excises according to the state court were levied under the same statute. True, the statutory situation had been changed in the interim by the provision in the Act of 1914 imposing an additional excise measured by the capital in excess of $10,000,000. Those who bow to the authority of arithmetic must concede that this additional excise had the effect of removing the maximum of $2,000 contained in the Act of 1909. But the result reached by the Supreme Court is that a corporation which did not benefit from the $2,000 maximum, and which could not under the facts of the case before the court be injured by its removal, nevertheless reaps from such removal the boon of immunity from previously valid demands.

This seems strange fruit to pick from the stock of realism. But on closer analysis it may appear that the fruit is from another tree. The artificiality was introduced when it was held in the Baltic Case that a tax on small corporations, measured by their total capital stock, was valid because a tax on their larger competitors or neighbors would be a specific charge of $2,000. The result of the Locomobile Case really questions the soundness of the Baltic Case. Yet the Locomobile Case cannot be said to shake the authority of the Baltic Case, since the Baltic Case was unanimously reaffirmed in the Cheney Brothers Case decided on the same day as the Locomobile Case. Quite plainly the Supreme Court has no present intention of receding from the Baltic Case.

The present state of the law can best be justified by being formulated as follows. Foreign corporations conducting within a state a local business which is distinct from their interstate business are subject to taxation for such exercise of their corporate functions. This taxation may take the form of a specific charge of a reasonable amount. $2,000 is a reasonable amount, whatever the size of the

corporation, and whatever the volume of the local business. If the state wishes to relieve corporations with small capital from the payment of the full $2,000, it may do so by giving what is in effect a sliding discount determined by the extent to which their capital stock falls short of $10,000,000, or some other properly designated sum. "If the maximum is no more than the amount which might be imposed as a flat charge on all seeking admission for domestic business, the reference to total capital stock may be regarded as an act of grace towards those who can benefit from it."[45]

It may be added that, even if the maximum were more than might be imposed as a flat charge on all, the court may properly regard this defect as cured by a provision for a discount in favor of those on whom it would be improper to impose the maximum. In such a provision it may find a sufficient reason for treating the question whether the maximum might be imposed on all as a purely hypothetical one, into which it need not enter in order to determine the dispute before it. This line of reasoning undoubtedly has curves which to some may make the line look like a circle. The premise on which the argument is built seems to be kicked out from under, after it has served its initial purpose. The difficulty can perhaps be avoided if we say that what maximum is reasonable varies with circumstances. Call this reasonable maximum, X. X may be larger where it is not the measure for taxes on small corporations than where it is. If in some cases the state provides that the tax shall be X − Y, and in others X − Z, then X may be regarded as reasonable provided it is suitable for all those cases for which it is made the sole measure. Even with this line of approach, it may well be urged that the court should consider the reasonableness of Y and Z. "Corporations with little capital might prefer a low rate applied to total capital, with no maximum, to a higher rate applied to total capital, with a maximum which would not affect the amount exacted of them."[46]

Perhaps after all the composite photograph of the decisions cannot be put in a logical frame. To many minds this would necessitate the conclusion that some of the decisions are "wrong." This easy way out of difficulties has its train of worshippers. But it would afford little solace to those corporations whose taxes were

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[45] 31 HARV. L. REV. 777.

[46] *Ibid.*, 612.

sanctioned by the decisions thus thrown into the discard. These entities, if they reasoned, might face with less rebellion the unescapable facts, by following the implication of Mr. Justice Holmes's statement that "we are to look for a practical rather than a logical or philosophical distinction." [47] And those whom William James was wont to call the "tough-minded" will easily follow the lure of the same bait.

From this angle, the decisions since 1910 may be looked at as modifications of the earlier doctrine that the power of the state over the local business of foreign corporations is unlimited. The earlier doctrine has not been abandoned to the extent of insisting that the exaction of the state must be nicely adjusted to the amount of local business carried on therein. Though the old arbitrary power has been throttled, the state still has some latitude in fixing the amount of its exaction. The tax falls on a proper subject, and its amount, like that of all excise taxes, may be fixed by more rough-and-ready methods than could be used in assessing *ad valorem* taxes on property. All that is required is that the methods selected shall not palpably and necessarily exact tribute from sources which lie within the protection of the commerce clause and the due-process clause. A maximum limitation on the demand is a safeguard against such covert invasion of forbidden territory by excises on large corporations. There is still the possibility that the limit set may not suffice to prevent excises on small corporations from encroaching on the area in which such small corporations are entitled to shelter. But this danger is greatly minimized if small corporations are assessed on a basis which is likely in most cases to give them the advantage of the circumstances which would make the maximum levy infringe their constitutionally protected interests.

As to the dangers which are not wholly averted, it can only be said with Mr. Justice Holmes that "constitutional law, like other mortal contrivances, must take some chances." [48] Courts cannot project the lines of constitutional limitations with the same delicate tracery with which they might draft statutes. Judges should be loath to declare invalid a fiscal system which is an exercise of constitutional power, merely because in some stray instances it may

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[47] Galveston, H. & S. A. R. Co. *v.* Texas, 210 U. S. 217, 227, 28 Sup. Ct. Rep. 638 (1908). The passage is quoted more at length in 31 Harv. L. Rev. 602.

[48] Blinn *v.* Nelson, 222 U. S. 1, 7, 32 Sup. Ct. Rep. 1 (1911).

operate in a manner that might be deemed unconstitutional if specifically devised for the particular case. Common law, statutes, and constitutional interpretation alike must at times, for the sake of a desirable degree of stability and generality, sacrifice the precision of adjustment that might be attained by kaleidoscopic or tessellated variations or modifications of the law to meet the peculiar demands of every conceivable situation. The Supreme Court has sacrificed generality in recognizing that a suitable maximum may remedy the vice of the measure of total capital stock. If it stops there, and declines to examine the balance sheets of every contentious taxpayer, it simply establishes a point beyond which for practical reasons it will not go. Whether or not these considerations furnish sufficient justification for the tenuousness of the logical distinction between the Baltic Case and the Cheney Brothers Case on the one hand, and the Locomobile Case on the other, they may at least explain where they do not justify.

Those who agree that the General Court of Massachusetts sought to subject foreign corporations to excises measured by their total capital stock without any qualification, and thus to accomplish what *Looney* v. *Crane Co.*[49] had forbidden, may still criticize the result of the Supreme Court's decision in the Locomobile Case.[50] It will be noted that the Supreme Court of the United States insisted that the Massachusetts statute of 1914 was a material element in the case before it, although the Massachusetts court had declared that it "need not be considered."[51] Thus the Supreme Court holds that the two statutes of Massachusetts are inseparable, although the Massachusetts court had clearly implied the contrary. The reason for the Supreme Court's attitude appears more clearly from its opinion in *International Paper Co.* v. *Massachusetts*,[52] decided on the same day as the Locomobile Case.

The International Paper Case involved an excise of $5,500 on a foreign corporation having an authorized capital of $45,000,000. Of this $5,500, $2,000 was levied under the Act of 1909, and $3,500 under the Act of 1914. It will be remembered that the Massachusetts court on September 13, 1917, had sustained the entire

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[49] Note 3, *supra*.

[50] Note 43, *supra*.

[51] Note 42, *supra*.

[52] 38 Sup. Ct. Rep. 292 (1918).

exaction.[53] The Supreme Court declares the whole levy invalid. In considering the Massachusetts legislation, Mr. Justice Van Devanter says:

> "While the legislation under which the tax was assessed and collected was enacted in part in 1909 and in part in 1914, its operation and validity must be determined here by considering it as a whole, for the opinion of the state court not only holds that the 'maximum limitation' put on the tax by the part first enacted 'is removed' by the other, but treats the two parts as exacting a single tax based on the par value of 'the entire authorized capital' and computed as to ten million dollars thereof at the rate of one fiftieth of one per cent and as to the excess at the rate of one one-hundredth of one per cent."[54]

And near the end of the opinion, the statement, that "since 1914 the Massachusetts law has been in its essential and practical operation like those held invalid"[55] in the Western Union Case and the Looney Case, is prefaced by the clause: "Accepting the state court's view of the change wrought by the later statute."[56] Thus the Supreme Court relies on the interpretation of the state court to reach the conclusion that the Act of 1909 is so amalgamated with the Act of 1914 that, if the latter cannot stand, the former must fall also.

No such question was passed upon by the Massachusetts court in the International Paper Case,[57] for that court held both statutes constitutional, and therefore was not called upon to inquire whether the Act of 1914 was separable from the Act of 1909. But in its opinion in the Locomobile Case,[58] it declared plainly enough that the Act of 1914 had no bearing on the validity of the Act of 1909. From this it is certain that the Massachusetts court would hold the two statutes separable whenever a decision of the controversy before it required consideration of the point. No one can doubt that the Massachusetts court, if it had thought that the Act of 1914 was inapplicable to foreign corporations engaged partly in interstate commerce, would have held that the frustrated attempt of the

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[53] International Paper Co. *v.* Commonwealth, 228 Mass. 101, 117 N. E. 246 (1917). See 31 Harv. L. Rev. 745–54.

[54] 38 Sup. Ct. Rep. 292, 293 (1918).

[55] 38 Sup. Ct. Rep. 292, 294 (1918).

[56] *Ibid.*

[57] Note 53, *supra.*

[58] Note 40, *supra.*

General Court of the Commonwealth did not operate to render inapplicable to such corporations the earlier Act of 1909. Yet the Supreme Court in effect assumes the contrary, by its failure to give specific consideration to the question whether the two statutes were separable. It seems to decline to go into the question on the ground that the state court had decided it against the contention of the complainants.[59]

Doubtless no one will be more surprised at this eventuation than the judges of the Massachusetts supreme court. Their disposition of the International Paper Case did not require them to consider whether one part of the tax could be held good if the other was declared invalid. And their analysis of the combined effect of the two statutes was not directed to any such issue. Moreover, in the Locomobile Case they insisted that the Act of 1909 stood entirely on its own legs. Yet the Supreme Court, without giving independent consideration to the question, relies on other statements of the Massachusetts court, wholly unrelated to the question of separability, to reach the conclusion that an unconstitutional addition to the Act of 1909 must be given the effect of invalidating the prior statute, though that is its sole effect.

Though the Supreme Court accepts the judgment of the state court on the question whether different provisions in state statutes are separable or not,[60] it forms its independent judgment when the state court has not spoken on the point.[61] The test which it applies is whether it can reasonably be believed that the legislature would

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[59] This cannot be the result of mere inadvertence, for the brief for the Commonwealth in the Locomobile Case contains the heading: "The New Statute (St. 1914, c. 724) has no Bearing upon the Rights of this Petitioner." Under this heading it was argued:

"If for any reason this new statute is unconstitutional as a whole, or if, by reason of particular circumstances in individual cases, any tax imposed under it upon any corporation subject to its terms is void, the system of taxation established by section 56 remains unaffected. Therefore the additional tax imposed by this statute is plainly separable from the tax imposed under section 56, and a decision that any tax under the statute of 1914 is invalid cannot affect taxes assessed upon any corporation whose authorized capital stock does not exceed $10,000,000. This in substance is the ruling of the Supreme Judicial Court of Massachusetts in the case at bar. The ruling of that court that these two statutes are entirely separable will, of course, be followed here as purely a matter of statutory construction."

[60] Noble *v.* Mitchell, 164 U. S. 367, 17 Sup. Ct. Rep. 110 (1896).

[61] International Text Book Co. *v.* Pigg, 217 U. S. 91, 112–13, 30 Sup. Ct. Rep. 481 (1910), holding provisions inseparable; Southwestern Oil Co. *v.* Texas, 217 U. S. 114, 120–21, 30 Sup. Ct. Rep. 496 (1910), holding provisions separable.

have enacted the valid part without the part which is declared invalid.[62] In *Winona and St. Peter Land Co.* v. *Minnesota*,[63] for example, the question was whether a statute imposing back taxes on real and personal property could be enforced as to real property if it was invalid as to personal property. The Supreme Court, speaking through Mr. Justice Brewer, expressed its approval of the decision of the state court as follows:

> "It seems to us, also, that the assumption that it cannot be believed that the legislature would never seek to provide for the collection of back taxes on real property without at the same time including therein a like provision for collecting back taxes on personal property, cannot be sustained."[64]

So the question which the Supreme Court should have asked and answered in the International Paper Case was whether it could reasonably be believed that the General Court would have wished to tax the complainant $2,000 if it could not tax it $2,000 plus $3,500. The question in the Locomobile Case was whether it could reasonably be believed that the General Court would have wished to continue to apply to the complainant the Act of 1909 if it could not apply to others the Act of 1914. To borrow a familiar form of statement, it can safely be said that "to ask the question is to answer it."

The result reached by the Supreme Court illustrates the hard saying that "from him that hath not shall be taken away even that which he hath."[65] As exegesis of a puzzling passage of Scripture, the decision may be welcomed. It may be a wholesome warning to the states not to encroach on forbidden ground, lest their trespasses cost them their own freeholds. But apart from its moral values, the result was a curious and unnecessary one. Before the passage of the Act of 1914, the Act of 1909 was without fault. The Act of 1914 did not purport to amend the Act of 1909. It refers to its predecessor only to spare itself from enumerating specifically the corporations to which it applies.[66] The Supreme Court holds that

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[62] Southwestern Oil Co. *v.* Texas, note 61, *supra, loc. cit.*

[63] 159 U. S. 526, 16 Sup. Ct. Rep. 83 (1895).

[64] 159 U. S. 526, 539, 16 Sup. Ct. Rep. 83, 88 (1895).

[65] Matthew 25: 29.

[66] The Act of 1914, by saying "every foreign corporation subject to the tax imposed by section fifty-six" etc., in effect adopts the interpretations of the Massachusetts

the Act of 1914 cannot be enforced against corporations engaged partly in interstate commerce. As to them it is void and of no effect. Yet it is given the important effect of vitiating the Act of 1909 in so far as it applies to corporations engaged partly in interstate commerce. The Supreme Court places the burden of this result on the shoulders of the Massachusetts court, because that court in analyzing and sanctioning the combined effect of the two statutes says rightly that the maximum limitation contained in the former is removed by the latter. But in thus characterizing the effect of the latter on the former, Chief Justice Rugg of the Massachusetts court was talking arithmetic, not law. His arithmetic was correct only if the Act of 1914 was valid and enforceable. He correctly described what Massachusetts sought to do. But it failed to accomplish its desires, because the Supreme Court forbade. The situation about which the state court was talking turns out not to exist. Yet what Chief Justice Rugg said about that situation, the Supreme Court treats him as saying about another situation which he never had in mind. By such thought transference the Massachusetts court is held responsible for the position that the Massachusetts excise system after 1914 was a unit which must stand or fall as a unit, although that court had stated specifically that in determining the constitutionality of enforcing the Act of 1909 after the enactment of the Act of 1914, the latter statute "need not be considered."[67]

Plainly enough the Supreme Court misapprehended the position of the Massachusetts court. And the state court must be held immune from most, if not all, of the responsibility for the blunder. It may perhaps be criticized for its failure to appreciate the likelihood that the Act of 1914 would come a cropper when it reached the Supreme Court. Had the Supreme Court handed down its decision in *Looney* v. *Crane Co.*[68] three months earlier, the Massachusetts court would have been clearly advised that the unlimited measure of total capital stock was an improper one to apply to foreign corporations engaged partly in interstate commerce, even

court as to what corporations *are* subject to section fifty-six. See note 39, *supra*. It was doubtless because of these interpretations of the court, that the Act of 1914 referred to the "corporations subject to the tax imposed" by the Act of 1909, and did not read, as did the Act of 1909, "every foreign corporation."

[67] Note 42, *supra*.

[68] Note 3, *supra*.

though that commerce was not some form of transportation. Yet, even as the situation stood in September, 1917, the Massachusetts court had ample warning of the strong probability that the Supreme Court would insist that a maximum limitation was a *sine qua non* in a statute using total capital stock as a basis for assessing excises on foreign corporations combining local and interstate commerce. However strong the state court's anticipations to the contrary, it would have done well to have appreciated the possibility of disillusionment, and to have guarded against the unfortunate result which ensued. This it might easily have done by devoting separate consideration to the levy on the International Paper Company under the Act of 1909 and to that under the Act of 1914, thus making it unmistakably clear to the Supreme Court that it did not think that the General Court of Massachusetts wished to exempt foreign corporations from excise taxes entirely, in case it would not be permitted to subject corporations having a capital in excess of $10,000,000 to the additional excise imposed in 1914.

The legal result of the Supreme Court's decision in the International Paper Case[69] and the Locomobile Case[70] is that all excise taxes levied by Massachusetts on foreign corporations engaged partly in interstate commerce during the years 1914, 1915, 1916, and 1917 were unconstitutional interferences with interstate commerce. For so the Supreme Court has declared. It happens that most of the foreign corporations doing business in Massachusetts during the last quadrennium have paid their excises without protest,[71] so that the results of the Supreme Court's declarations are less extensive than they might have been. Taxes which could be regarded as constitutional only "upon the theory that our dual system of government has no existence"[72] have been paid and cannot be recovered, yet the government at Washington still lives. This contradiction between the law and the facts raises nice questions as to the conceptualist attitude which partitions governmental power in the United States between two authorities, each "sovereign" in its respective sphere, each impotent in the sphere of the other, and

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[69] Note 52, *supra.*

[70] Note 43, *supra.*

[71] From information derived from Wm. Harold Hitchcock, Esq., Assistant Attorney General of Massachusetts.

[72] Looney *v.* Crane Co., 245 U. S. 178, 187, 38 Sup. Ct. Rep. 85 (1917). The passage is quoted more at length in 31 Harv. L. Rev. 603–04.

the sphere of each wholly distinct from that of the other. It makes a pretty mental picture, but the subject of the picture never sat for it.

Since the decision of the Supreme Court in the Locomobile Case, Massachusetts has confessed the error of its ways and has brought forth fruits meet for repentance by repealing the offending Act of 1914.[73] This will doubtless restore the Act of 1909 to favor with the Supreme Court from now on, in spite of the fact that the opinion in the Locomobile Case referred to it as "indistinguishable from those adjudged invalid"[74] in the Western Union Case and those following it, thus implying that the Act of 1909 too was "invalid." But this *usus loquendi* is probably a short-cut expression having reference only to the particular situation before the court for adjudication. So far as the decisions of the Supreme Court have yet gone, the Act of 1909 might all the time have been applied to foreign corporations whose business within the state is entirely local commerce or manufacture. And even if the Supreme Court is now of opinion that the due-process clause protects foreign corporations from excises measured by their total capital stock, whether they are engaged in interstate commerce or not, and that therefore the Act of 1909 was entirely unenforceable so long as the Act of 1914 was on the statute books, it may still recognize that the "invalidity" of the Act of 1909 was due entirely to its association with the Act of 1914, and that the dissolution of the connection between them will restore the Act of 1909 to its pristine purity. Yet after the court's decision in the Locomobile Case, the general Court of Massachusetts might have done well, *ex majore cautela*, to accompany its repeal of the Act of 1914 with an express reënactment of the Act of 1909, and thus to deprive the Supreme Court of any opportunity to declare that the Act of 1909 was so dead that it could not be raised to life by the repeal of the Act of 1914.[75]

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[73] Chapter 76, General Code, Act of 1918; in effect March 18, 1918.

[74] 38 Sup. Ct. Rep. 298 (1918).

[75] While such a procedure would have made the future secure, it might be taken as a confession which would operate to the disadvantage of the Commonwealth in the few pending cases to recover excises levied under the Act of 1909 during the period between the enactment and the repeal of the Act of 1914. Those cases are of course on all fours with the Locomobile Case. Nevertheless it is still open to the state court to declare that the Act of 1914 was always separable from the Act of 1909, and on that ground to sustain taxes levied under the Act of 1909 after 1914.

As was to be anticipated, the Supreme Court had no difficulty in reaching the conclusion that the International Paper Company was entitled to be excused from payment of the excise measured by its total capital in excess of $10,000,000. The only possible distinction which could be drawn between the question presented and that settled in the Looney Case lay in the fact that the International Paper Company was engaged in manufacturing in Massachusetts. It will be remembered that the Massachusetts court seemed to attach some weight to this, observing that "the local manufacture of paper is disconnected with the interstate business of the petitioner except as an artificial relation has been established by the petitioner,"[76] and relying on cases holding that manufacture is not commerce.[77] The Supreme Court makes no mention of this possible distinction between the power of the state over foreign corporations whose business within the state consists largely of manufacturing and that over those whose entire local business is technically commerce. Mr. Justice Van Devanter contents himself with summarizing the propositions to be deduced from the line of cases beginning with the Western Union Case and ending with the Looney Case, and then saying of the Looney Case:

"That case and those which it followed and affirmed are fully decisive of this. The statutes then and now in question differ only in immaterial details, and the circumstances of their application or attempted application are essentially the same. In principle the cases are not distinguishable."[78]

With this disposition of the cases from Massachusetts, it seems clear that the statute of Virginia applied by the Virginia court in *General Ry. Signal Co.* v. *Commonwealth*,[79] and the statute of Ten-

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The state court is not bound by the Supreme Court's erroneous interpretation of its previous utterance. The Supreme Court, on the other hand, will be bound by a definite and unescapable declaration from the state court that the offending Act of 1914 was entirely separate and distinct from the Act of 1909. Thus the state court can prevent the recurrence of the fatality which happened in the Locomobile Case, without laying itself open to the charge of attempting to give retroactive effect to the repeal of the Act of 1914.

[76] International Paper Co. *v.* Commonwealth, 228 Mass. 101, 112, 117 N. E. 246 (1917). See 31 HARV. L. REV. 749.

[77] See 31 HARV. L. REV. 746.

[78] 38 Sup. Ct. Rep. 292, 295 (1918).

[79] 118 Va. 301, 87 S. E. 598 (1916). See 31 HARV. L. REV. 756–59.

nessee applied by the Tennessee court in *Atlas Powder Co.* v. *Blue*,[80] will meet with a similar fate when they reach the Supreme Court. There is a possibility that the local business of the particular complainant in the Virginia case might be regarded by the Supreme Court as so distinct from any interstate commerce in which the corporation was engaged, that its immunity from a demand measured by its total capital stock will depend upon whether the Supreme Court will overrule *Horn Silver Mining Co.* v. *New York*,[81] and thus reach the same result under the due-process clause alone as it reaches under the due-process and commerce clauses together. Yet if manufacturing is not sufficiently distinct from interstate commerce to prevent the applicability of the commerce clause, it is hard to see how a different attitude can reasonably be taken towards construction work done in the state with materials introduced from other states.

The only important question left open by the Supreme Court decisions is whether excises on foreign corporations engaged partly in interstate commerce may be measured by the receipts from all business done within the state. On this question the due-process clause has no bearing. But the receipts from interstate commerce could not be taxed directly, and the question whether they may be made the measure of a tax on a proper subject of state authority is logically difficult to distinguish from the issues raised under the commerce clause in *Looney* v. *Crane Co.*[82] and *International Paper Co.* v. *Massachusetts*.[83] But the Supreme Court has sacrificed strict logic for other considerations in sustaining taxes in fact measured by the total capital stock of the complaining corporation, provided taxes on larger corporations would be fixed by a specific maximum provision in the statute. And it may conceivably sacrifice logic and hold that the measure of receipts from business actually done within the state has not the vice of a measure which includes the value of property without the state.

We might hope to get material for prophecy from *Crew Levick Co.* v. *Pennsylvania*,[84] decided December 10, 1917; but the opinion of

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[80] 131 Tenn. 490, 175 S. W. 547 (1915). See 31 HARV. L. REV. 754–56.

[81] 143 U. S. 305, 12 Sup. Ct. Rep. 403 (1892).

[82] Note 3, *supra*.

[83] Note 52, *supra*.

[84] 245 U. S. 292, 38 Sup. Ct. Rep. 126 (1917).

Mr. Justice Pitney carefully left the precise question open. That case held that a tax on wholesale and retail dealers of merchandise, whose amount was based on the volume of business transacted, could not be measured by any receipts from foreign commerce. The portion of the tax so measured, it was said, "necessarily varies in proportion to the volume of that commerce, and hence is a direct burden upon it."[85] And earlier in the opinion it was declared:

> "It [the tax] operates to lay a direct burden upon every transaction in commerce by withholding, for the use of the state, a part of every dollar received in such transactions. That it applies to internal as well as to foreign commerce cannot save it; . . ."[86]

But the opinion also says that "the distinction between this tax" and that "sustained in *Maine* v. *Grand Trunk Ry. Co.*"[87] is "obvious;"[88] and it says further that the tax "bears no semblance of a property tax, *or a franchise tax in the proper sense.*"[89]

Thus plainly *Maine* v. *Grand Trunk Ry. Co.*[90] is left unoverruled, and the court has explicitly left itself free to decide that a "franchise tax in the proper sense" may be measured in part by receipts which may not be taxed directly. When such a case comes before the Supreme Court, it may remind us that in all the cases annulling taxes measured by total capital stock, the due-process clause as well as the commerce clause was a factor. And it may say that these so-called franchise taxes measured by receipts from business done within the state are in substance taxes on intangible property and therefore sustainable as such, provided this same intangible property has not already been included in the assessment of other taxes.[91]

We shall know later.

(*To be continued.*)

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[85] 245 U. S. 292, 297–98, 38 Sup. Ct. Rep. 126 (1917).
[86] 245 U. S. 292, 297, 38 Sup. Ct. Rep. 126 (1917).
[87] 142 U. S. 217, 12 Sup. Ct. Rep. 121 (1891).
[88] 245 U. S. 292, 298, 38 Sup. Ct. Rep. 126 (1917).
[89] 245 U. S. 292, 297, 38 Sup. Ct. Rep. 126 (1917). Italics are the writer's.
[90] Note 87, *supra*.
[91] See 31 Harv. L. Rev. 768, note 166.

INDIRECT ENCROACHMENT ON FEDERAL AUTHORITY BY THE TAXING POWERS OF THE STATES.[1] V

II. Regulations of Interstate Commerce (*continued*)

2. *Taxes not Discriminating against Interstate Commerce* (continued)

B. Taxes on Property

REFERENCE has already been made to the cases which treat franchises as property and consider the assessment of such franchises by the criteria which obtain in judging whether taxes on property are regulations of interstate commerce.[2] This indicates that there is no hard and fast line to be drawn between privileges and property. When a franchise may be disposed of for a price, it is of course a form of property. Conversely, all property is to an extent a matter of privilege. The remedies for interference with property interests are essential to the security and salability of those interests. In so far as the remedies are the creation of the law, and are subject to amendment or withdrawal, the interests which the remedies serve partake of the nature of privilege, and taxes on those interests might by a chain of reasoning be deemed taxes on privileges.

The pursuit of these fascinating possibilities will be left to those who care to indulge in it. It is enough for our present purpose to disclaim any assumption of perfection or of inherent validity in the schematism here employed. The topical headings and their order of treatment are chosen solely from considerations of convenience. Though privilege and property are not mutually exclusive categories, horses and land and ties and rails are different from corporate franchises and the right to inherit. Roughly speaking, taxes on property may be distinguished from taxes on privileges, even though the two share some common because of vicinage.

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[1] For preceding instalments of this discussion see 31 Harv. L. Rev. 321–72 (January, 1918), *Ibid.*, 572–618 (February, 1918), *Ibid.*, 721–78 (March, 1918) and *Ibid.*, 932–53 (May, 1918).

[2] 31 Harv. L. Rev. 768, note 166.

This common has already been pointed out in discussing taxes on privileges,[3] and there will be occasion to refer to it again. It is also to be borne in mind that no exercise of state fiscal power can adequately be judged in isolation. The legitimacy of any particular demand may depend upon the presence or absence of some other or others. But threads must first be spun before they can be woven together. If any misapprehensions are permitted or fostered by the effort to disentangle in analysis what is interrelated in practice, they will, it is hoped, be dispelled by a later venture in synthesis.

The taxes on property here to be considered do not include those levied on the property that is carried in interstate commerce and offered for sale after reaching its destination. Such taxes, with the exception of those which in some fashion discriminate against interstate commerce,[4] are not treated as instances of indirect encroachment on the realm of federal control. Property in interstate transit[5] and property that has completed its journey[6] present the issue of taxability rather than that of valuation. What we are here concerned with are the taxes which are confessedly on proper subjects of state power, but which are assessed in ways that are alleged to exceed that power. The issue is whether the subject or the method of assessment shall be regarded as controlling. The property taxes which raise this issue are those on property which is an instrument of interstate commerce, whether peripatetic like cars and engines or immobile like ties and track. When property of an intangible character intrudes itself into the discussion, it is because the Supreme Court has chosen to make a classification for which it must bear the responsibility.

I

On December 15, 1873, in *Union Pacific R. R. Co.* v. *Peniston*,[7] a majority of the Supreme Court rejected the contention that the property of the Union Pacific was exempt from state taxation on account of the relation of the road to the federal government.

[3] 31 Harv. L. Rev. 768, note 166.
[4] See 31 Harv. L. Rev. 572–74.
[5] See editorial note in 26 Harv. L. Rev. 358–60.
[6] Brown *v.* Houston, 114 U. S. 622, 5 Sup. Ct. Rep. 109 (1885).
[7] 18 Wall. (U. S.) 5 (1873). See 31 Harv. L. Rev. 371, note 171.

Three dissenting justices, however, argued that the property itself was an agency of the United States, and was therefore as immune from state taxation as are the bonds of the United States or the operations of the United States Bank. Less than three months later, in *The Delaware Railroad Tax*,[8] Mr. Justice Field indicated without objection from any of his colleagues that a state tax on the property of an interstate carrier was not a regulation of interstate commerce. From that day forward it has never been seriously doubted that a tax on tangible property used as an instrument of interstate commerce is not a tax on that commerce.[9] Such disputes as we have here to chronicle relate to the propriety of methods adopted for assessing that property.

Mr. Justice Field's remarks about property taxation in *The Delaware Railroad Tax*[10] must be regarded as *obiter*, since he had previously stated that the tax before the court was not a tax on property, but one "upon the corporation itself, measured by a percentage upon the cash value of a certain proportional part of the shares of its capital stock."[11] It is to be inferred that the tax, if one on property, would have been held to be faulty because of the method by which the amount of property in Delaware was determined. The statute required each company subject to the act to pay a tax of one-fourth of one per cent on such proportion of the cash value of all its shares as the length of the line in Delaware bore to the total mileage. It was conceded that the "ratio of the value of the property in Delaware to the value of the whole property of the company" was considerably "less than that which the length of the road in Delaware bears to its entire length."[12] From this Mr. Justice Field concluded that "a tax imposed upon the property in Delaware according to the ratio of the length of its road to the length of the whole road must necessarily fall on property without the State,"[13] and observed that, upon the assump-

[8] 18 Wall. (U. S.) 206 (1873).

[9] In 1891 Mr. Justice Gray on page 23 of his opinion in the Pullman case, note 33, *infra*, declared: "It is equally well settled that there is nothing in the Constitution or laws of the United States which prevents a State from taxing personal property, employed in interstate or foreign commerce, like other personal property within its jurisdiction."

[10] Note 8, *supra*.

[11] 18 Wall. (U. S.) 206, 231 (1873).

[12] *Ibid.*, 230.

[13] *Ibid.*, 231.

tion that the tax was on property, there would be great difficulty in sustaining it.

The tax was therefore regarded as one "upon the corporation itself," which seems to mean upon the right to exist as a corporation. It was sustained on the theory that the state has absolute power over its own corporate creatures. After saying that "the State may impose taxes upon the corporation as an entity existing under its laws, as well upon the capital stock of the corporation or its separate corporate property,"[14] Mr. Justice Field added that "the manner in which its value shall be assessed and the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion."[15] In view of the previous indication that the caprice of the state would have been curbed, had the tax been one on property, this imputation to the state of arbitrary power must be confined to the assessment of the franchise. But the suggested limitation on the power to tax property is predicated, not on the commerce clause, but on the position that the state must confine its exactions to property within the jurisdiction.

The two closing paragraphs of the opinion dismiss the objections under the commerce clause. That the conclusion is not confined to taxes on the franchise is manifest from the final sentence:

> "*The exercise of the authority* which every State possesses *to tax* its corporations and *all their property, real and personal*, and their franchises, and to graduate the tax upon the corporations *according to* their business or income, or *the value of their property*, when this is not done by discriminating against rights held in other States, and the tax is not on imports, exports, or tonnage or transportation to other States, *cannot be regarded as conflicting with any constitutional power of Congress.*"[16]

The tax in question was said to affect commerce among the states "just in the same way, and in no other, that taxation of any kind necessarily increases the expenses attendant upon the use or possession of the thing taxed."[17] And Mr. Justice Field, though he had dissented in *State Tax on Railway Gross Receipts*,[18] decided twelve months earlier, quotes with approval from the opinion in that case to the effect that "it is not everything that affects com-

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[14] 18 Wall. (U. S.) 231 (1873).
[15] *Ibid.*
[16] *Ibid.*, 232. Italics are author's.
[17] *Ibid.*
[18] 15 Wall. (U. S.) 284 (1872). See 31 Harv. L. Rev. 576–77.

merce that amounts to a regulation of it, within the meaning of the Constitution."[19]

Of course the majority judges in the Gross Receipts case could find no fault with taxing property employed in interstate commerce. That case, it will be remembered, sustained a tax levied directly on gross receipts. One of the grounds adduced by the majority was that the receipts were a fund actually in the hands of the corporation, disassociated from the source whence they were derived. The artificiality of this conception was exposed by the minority at the time, and fourteen years later was recognized by a unanimous court.[20] But while the doctrine prevailed, there could be no doubt that a state might effectively tax interstate commerce, provided it was careful not to impose the tax formally on the commerce itself. It is significant, however, that the judges who dissented in *State Tax on Railway Gross Receipts*[21] interposed no objection to the statement in *The Delaware Railroad Tax*[22] that the property of an interstate carrier was taxable at its full value. The only qualification suggested was that this value must not be inflated by the inclusion of elements not local to the taxing state. It seemed to be assumed that the valuation could take the form of a capitalization of earnings, including those from interstate commerce, for the value of the entire road was fixed by the cash value of the shares of capital, which would of course be determined in large measure by some estimate of earnings.

Three years later, in the *State Railroad Tax Cases*,[23] the propriety of this mode of assessment was distinctly affirmed, so far as the Fourteenth Amendment was concerned. Mr. Justice Miller pointed out that "the visible or tangible property of the corporation . . . may or may not include all its wealth."[24] "There may be other property of a class not visible or tangible which ought to respond to taxation, and which the State has a right to subject to taxation."[25] And the method of assessment adopted by Illinois was indicated and approved as follows:

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[19] 15 Wall. (U. S.) 293 (1872); quoted in 18 Wall. (U. S.) 206, 232 (1873).

[20] Philadelphia & Southern Mail S. S. Co. *v.* Pennsylvania, 122 U. S. 326, 7 Sup. Ct. Rep. 1118 (1887).

[21] Note 18, *supra.*

[22] Note 8, *supra.*

[23] 92 U. S. 575 (1876).

[24] *Ibid.*, 602.

[25] *Ibid.*

"It is therefore obvious that, when you have ascertained the current cash value of the whole funded debt, and the current cash value of the entire number of shares, you have, by the action of those who above all others can best estimate it, ascertained the true value of the road, all its property, its capital stock and its franchises; for these are all represented by the value of its bonded debt and of the shares of its capital stock." [26]

The *State Railroad Tax Cases* [27] did not involve interstate commerce,[28] since the complainants rested their objections wholly on other grounds. Not until twelve years later did the commerce question come again before the court. It was then decided in *Western Union Telegraph Co.* v. *Massachusetts* [29] that it was not a regulation of interstate commerce to assess the property of an interstate telegraph company by taking that proportion of the assessable value of the total capital stock which the miles of line within the state bore to the total miles of line. Mr. Justice Miller distinctly stated that the tax was not one on the franchise of the company, which interpretation seemed to be necessary to save the tax from being one on a federal instrumentality. "The tax in the present case," he said, "though nominally upon the shares of the capital stock of the company, is in effect a tax upon that organization on account of property owned and used by it in the State of Massachusetts." [30] Inasmuch as the assessable value of the total capital stock was based on the market value of the outstanding shares, the assessment necessarily took account of earnings. This is evident from *Massachusetts* v. *Western Union Telegraph Co.*,[31] a later case between the same parties involving subsequent taxes levied under the same statute. For there it appeared that the company "admitted its liability to pay a tax on the actual value, as stated in its answer, of its real and personal property within the

[26] 92 U. S. 605 (1876).

[27] Note 23, *supra.*

[28] For other cases sustaining the application of the so-called "unit rule" or some modification thereof, when interstate commerce was not involved, see Kentucky Railroad Tax Cases, 115 U. S. 321, 6 Sup. Ct. Rep. 57 (1885), Marye *v.* Baltimore & Ohio R. Co., 127 U. S. 117, 8 Sup. Ct. Rep. 1037 (1888), Charlotte C. & A. R. Co. *v.* Gibbes, 142 U. S. 386, 12 Sup. Ct. Rep. 255 (1892), and Columbus Southern Ry. Co. *v.* Wright, 151 U. S. 470, 14 Sup. Ct. Rep. 396 (1894).

[29] 125 U. S. 530, 8 Sup. Ct. Rep. 961 (1888).

[30] *Ibid.*, 530, 552.

[31] 141 U. S. 40, 11 Sup. Ct. Rep. 889 (1891).

State," [32] and paid into court the sum so admitted to be due, which was less than that held rightfully demanded under the statute.

On the same day the court also decided *Pullman's Palace Car Co.* v. *Pennsylvania*,[33] which sanctioned Pennsylvania's method of taxing the cars that ran in and out of the state during the year. Most of the discussion in both the majority and minority opinions was concerned with the question whether the cars had a taxable situs in the state. The minority insisted that, since no specific cars were permanently located there, no cars were taxable. But the majority held it proper to estimate the average number of cars and to tax such car property, even though no single car stayed still long enough to give it a situs within the state. The tax purported to be based on a portion of the capital stock, but the court treated it as substantially one on the cars as property.

Surprisingly little was said about the method of assessment, which is described in the majority opinion as follows:

> "The mode which the State of Pennsylvania adopted, to ascertain the proportion of the company's property upon which it should be taxed in that State, was by taking as a basis of assessment such proportion of the capital stock of the company as the number of miles over which it ran cars within the State bore to the whole number of miles, in that and other States, over which its cars were run." [34]

Then follows the approving comment:

> "This was a just and equitable method of assessment; and, if it were adopted by all the States through which these cars ran, the company would be assessed upon the whole value of its capital stock, and no more." [35]

The validity of this method of assessment was said to have been established by the *State Railroad Tax Cases* [36] and *Western Union Telegraph Co.* v. *Massachusetts*.[37] But the former case raised no question under the commerce clause, and in the latter the only attention given to the method of assessment was to ascertain whether the state had correctly determined the proportion of the

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[32] 141 U. S. 40, 45, 11 Sup. Ct. Rep. 889 (1891).

[33] 141 U. S. 18, 11 Sup. Ct. Rep. 876 (1891).

[34] *Ibid.*, 18, 26.

[35] *Ibid.*

[36] Note 23, *supra*.

[37] Note 29, *supra*.

total property located in Massachusetts. The fact that the valuation took account of earnings from interstate commerce was neglected.

It is also neglected in the Pullman case. Mr. Justice Gray's opinion for the majority notes that the company had about one hundred cars in the state all the time, but does not suggest that the value of that number of cars might readily be estimated without adopting a method that reaches the business as well as the property of the company. Nor do the minority protest on this point. True, Mr. Justice Bradley questions whether a proper method of apportionment has been adopted, and shows that, since Illinois, the state in which the corporation was chartered, might tax it on the value of its total capital stock, the supposed equitable quality of the tax discovered by the majority depends upon an assumption not likely to be true. But this protest is one against inequitable and double taxation, and is not tied up to the commerce clause. Yet this tax had a more direct effect on interstate commerce than those previously considered, for its amount varied more directly with receipts. Under several of the Pennsylvania statutes the taxes on the Pullman Company were measured directly by dividends; under another they were measured by dividends when the dividends were six per cent or more on the par value of the capital, and by a valuation of the capital when the dividends were less. But the opinions do not refer to the fact that the result of Pennsylvania's method was to reap income from the interstate commerce in which the cars were engaged, in excess of a levy on the value of the cars as independent chattels.

Seven months later, however, in *Maine* v. *Grand Trunk Ry. Co.*,[38] the subject receives more direct attention. This case has already been considered in the section dealing with taxes on privileges,[39] but it has a bearing on the present topic on account of the interpretation subsequently put upon it.[40] The majority sustained a tax measured by gross receipts estimated to have been earned from business within the state, on the ground that the subject taxed was a privilege over which the state had complete control and which it

[38] 142 U. S. 217, 12 Sup. Ct. Rep. 121 (1891).
[39] 31 Harv. L. Rev. 579–80.
[40] See Galveston, H. & S. A. Ry. Co. *v.* Texas, 210 U. S. 217, 226, 28 Sup. Ct. Rep. 638 (1908).

might therefore burden as it pleased. The minority, consisting of Justices Bradley, Harlan, Lamar, and Brown, insisted that the tax, though called one on the franchise, was in fact one "on the receipts of the company derived from international transportation."[41] Justices Bradley and Harlan had dissented in the Pullman case, in which Mr. Justice Brown had not sat, having been appointed to the bench after the case had been argued; but Mr. Justice Lamar had concurred in that case and also in *Western Union Telegraph Co.* v. *Massachusetts*,[42] in which Mr. Justice Harlan was with him. Mr. Justice Bradley for some reason did not sit in the Western Union case, but he was on the bench when *The Delaware Railroad Tax*[43] was decided by a unanimous court. It seems, then, that the dissent in the Grand Trunk case is to be attributed, not so much to long-standing convictions, as to a new recognition of the problem.

Mr. Justice Bradley's dissent in the Grand Trunk case starts with the position that, "whilst the purpose of the law professes to be to lay a tax upon the foreign company for the privilege of exercising its franchise in the State of Maine, the mode of doing this is unconstitutional."[44] The learned justice here seems to look behind the subject taxed, and to attach controlling significance to the measure by which the amount of the tax is determined — an enterprise which the court had hitherto regarded as beyond its province.[45] He insists that the nominal subject is not the actual subject. "The tax, it is true, is called a tax on a franchise. It is so called, but what is it in fact? It is a tax on the receipts of the company derived from international transportation."[46] And the cases then adduced as precedents against its constitutionality are those in which the *res* named as the subject of taxation included the business of interstate commerce, or receipts therefrom. Had the majority taken the same view of what was being taxed, they would undoubtedly have agreed that the tax was unconstitutional. But they accepted the state's declaration of what it was taxing, and thought that a tax on a privilege that the state might with-

[41] 142 U. S. 217, 235, 12 Sup. Ct. Rep. 121 (1891).

[42] Note 29, *supra*.

[43] Note 8, *supra*.

[44] 142 U. S. 217, 231, 12 Sup. Ct. Rep. 121 (1891).

[45] See 31 HARV. L. REV. 334 *ff*.

[46] 142 U. S. 217, 235, 12 Sup. Ct. Rep. 121 (1891).

hold could not be a regulation of interstate commerce, no matter how it was measured.

Mr. Justice Bradley's position that the measure by which the amount of the tax is determined is the controlling test of what is actually being taxed is of course as applicable to taxes nominally on property as to those nominally on privileges. Indeed, since there has never been ascription to the state of arbitrary power over property, there is more reason for scrutinizing assessments of property than assessments of franchises. Mr. Justice Bradley does not seem to make any distinction between the two. Yet it is possible that his objections are leveled chiefly against the cumulation of taxes in fact measured by the contributions of interstate commerce, and that he would have acquiesced in the solution of the vexed problem that the Supreme Court at the present time seems to be working towards.

The learned justice concludes his opinion as follows:

> "Then it comes to this: A State may tax a railroad company upon its gross receipts, in proportion to the number of miles run within the State, as a tax on its property; and may also lay a tax on these same gross receipts in proportion to the same number of miles, for the privilege of exercising its franchise in the State. I do not know what else it may not tax the gross receipts for. If the interstate commerce of the country is not, or will not be, handicapped by this course of decision, I do not understand the ordinary principles which govern human conduct." [47]

And earlier, in describing the situation resulting from the case and its predecessors, he had said:

> "A corporation, according to this class of decisions, may be taxed several times over. It may be taxed for its charter; for its franchises; for the privilege of carrying on its business; it may be taxed on its capital, and it may be taxed on its property. Each of these taxations may be carried to the full amount of the property of the company. I do not know that jealousy of corporate institutions could be carried much further." [48]

This dissenting note of lament and sympathy deserves attention from those who love to insist that the Supreme Court has been overzealous in shielding corporations from their just burdens. Its interest for our immediate purpose, however, lies in its indication

[47] 142 U. S. 217, 235–236, 12 Sup. Ct. Rep. 121 (1891).

[48] *Ibid.*

of the possibility that what caused Mr. Justice Bradley most concern was the cumulation of taxes on the same economic interest, rather than the fact that interstate commerce did not escape entirely from giving sustenance to the states. It shows, too, the recognition that every tax may depend for its justification on the absence of certain other possible taxes. No just solution of the complex problem raised by alleged conflicts between state taxing power and the necessary freedom of interstate commerce can be reached if the state is not required to let its right hand know what its left hand doeth.

II

From the foregoing review it appears that for two decades the Supreme Court had been allowing states to impose taxes that from an economic standpoint were levied more or less directly on receipts from interstate commerce. In all this time, however, none of the opinions had indicated clearly that the court knew exactly what it was doing and was prepared to support its decisions by accurate and detailed analysis of the economics of the matter. The judges were engaged in the task of finding what subjects of taxation were interstate commerce itself, and what were something else. They assumed that a tax on a subject not itself interstate commerce could not be a regulation of that commerce; and they were prone to indulge in nominalism and conceptualism in finding what was the subject taxed. In *State Tax on Railway Gross Receipts*[49] and in *Osborne* v. *Mobile*,[50] they took positions that they later abandoned.[51] They seemed to be feeling their way in the dark. From 1894 on, however, the issues are more clearly recognized and more adequately discussed.

In *Cleveland, C., C. & St. L. R. Co.* v. *Backus*,[52] Mr. Justice Brewer leaves no doubt as to what the majority of the court think about the propriety of assessing railroad property so as to include the value of the interstate commerce in which the road is engaged. This case and a companion one[53] had to do with Indiana statutes

[49] Note 18, *supra*.

[50] 16 Wall. (U. S.) 479 (1872).

[51] The former in Philadelphia & Southern Mail S. S. Co. *v.* Pennsylvania, note 20, *supra;* the latter in Leloup *v.* Mobile, 127 U. S. 640, 8 Sup. Ct. Rep. 1380 (1888).

[52] 154 U. S. 439, 14 Sup. Ct. Rep. 1122 (1894).

[53] Pittsburgh, C. C. & St. L. Ry. Co. *v.* Backus, 154 U. S. 421, 14 Sup. Ct. Rep. 1114 (1894).

which, while not requiring the tax commissioners to assess railroad property on the basis of its earnings, clearly permitted them to do so. And it was quite evident that they had done so, for one road was valued at $6,000 per mile less than another, and the assessment of a previous year under the method then prevailing was nearly trebled under the new statute. The decision in the two cases is that value is a matter of fact for the assessors to determine, and that the court will not upset that determination unless it is fraudulent. But the opinion in the Cleveland case unequivocally approves of the position that the value in fact is what the road would sell for, that this depends on the earnings, and that therefore the earnings may and should be considered in estimating that value.

"The rule of property taxation," says Mr. Justice Brewer, "is that the value of the property is the basis of taxation." [54] "It does not mean," he adds, "a tax upon the earnings which the property makes, nor for the privilege of using the property, but rests solely upon that value." [55] Then he states what value is:

> "But the value of property results from the use to which it is put and varies with the profitableness of that use, present and prospective, actual and anticipated. There is no pecuniary value outside of that which results from such use. The amount and profitable character of such use determines the value, and if property is taxed at its actual cash value it is taxed upon something which is created by the uses to which it is put." [56]

The opinion then goes on to say that "in the nature of things it is practically impossible — at least in respect to railroad property — to divide its value, and determine how much is caused by one use to which it is put and how much by another." [57] The learned justice asks whether an interstate bridge, the value of which depends entirely on interstate commerce, must "on that account be entirely relieved from the burden of state taxation." [58] He assumes two such bridges, one between two large centers of population and the other between two hamlets, and inquires whether they must be valued at the same amount, in spite of the fact that one is obviously worth much more than the other. "Will it be said that the taxation must be based simply on the cost, when never was it held

[54] 154 U. S. 439, 445, 14 Sup. Ct. Rep. 1122 (1894).
[55] *Ibid.* [56] *Ibid.* [57] *Ibid.*
[58] *Ibid.*, 439, 446.

that the cost of a thing is the test of its value?"[59] It is a practical impossibility to "eliminate all of the value which flows from the use, and place the assessment at only the sum remaining."[60] There are only two alternatives. "Either the property must be declared wholly exempt from state taxation or taxed at its value, irrespective of the causes and uses which have brought about such value."[61]

Of course Mr. Justice Brewer's conclusion is not so ineluctable as he seems to think. The value for purposes of state taxation need not be the economic exchange value. While railroad property is merged in the business in which it is engaged, since it has no feasible alternative uses, this is not true of all property, and by resort to hypothesis a separation can be made of the value of the property of a railroad from that of the business which it serves. The fact that it may be difficult or impossible to express the results mathematically with any degree of accuracy does not prevent some compromise between the two alternatives which Mr. Justice Brewer regarded as the only ones conceivable. Such a compromise the court has been compelled to make time and again in finding "fair value" for purposes of rate regulation.[62] And the same compromise might have been made in finding value for purposes of taxation. When the court declines to do so, it is guided by considerations of policy, whether it is aware of the fact or not.

Mr. Justice Brewer plainly invokes considerations of policy when he declares:

"And the uniform ruling of this court, *a ruling demanded by the harmonious relations between the States and the national government*, has affirmed that the full discharge of no duty entrusted to the latter restrains the former from the exercise of the power of equal taxation upon all private property within its territorial limits. All that has been decided is that, beyond the taxation of property, . . . no state shall attempt to impose the added burden of a license or other tax for the privilege of using, constructing, or operating any bridge, or other instrumentality of interstate commerce, or for carrying on of such commerce."[63]

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[59] 154 U. S. 439, 446, 14 Sup. Ct. Rep. 1122 (1894).

[60] *Ibid.*

[61] *Ibid.*

[62] See Robert L. Hale, "The Supreme Court's Ambiguous Use of 'Value' in Rate Cases," 18 Col. L. Rev. 208.

[63] 154 U. S. 439, 446, 14 Sup. Ct. Rep. 1122 (1894).

Here the position seems to be that what the commerce clause inhibits is the cumulation of taxes on interstate commerce. But the cumulation denounced does not include taxes on the franchise to be a corporation or to employ corporate powers in local business. Whether taxes on such privileges may be imposed in addition to taxes on property is left uncertain. But there is no uncertainty as to the elements that may be considered in assessing property:

"It is enough for the State that it finds within its borders property which is of a certain value. What has caused that value is immaterial. It is protected by state laws, and the rule of all property taxation is the rule of value, and by that rule property engaged in interstate commerce is controlled the same as property engaged in commerce within the State."[64]

This, of course, is because the court chooses to have it so. The wisdom of their choice is not here disputed. But the effort to show that the choice does not result in burdening interstate commerce cannot receive the same approval. It is difficult to agree that the assessment of property by reference to the earnings of the business to which the property is devoted is not "an attempt to do by indirection what cannot be done directly — that is, to cast a burden on interstate commerce."[65] An accountant would hardly be satisfied with the argument that "it comes rather within that large class of state action, like certain police restraints, which, while indirectly affecting, cannot be considered as a regulation of interstate commerce, or a direct burden on its free exercise."[66] Even a rhetorician might find the argument a concession that the state may do indirectly what it is forbidden to do directly. If we are interested primarily in what happens, and only secondarily in what words are used to justify or condemn it, we observe little, if any, difference between a tax on receipts and a tax on property assessed on a basis of receipts. When a court holds that taxes on property may be measured by receipts from interstate commerce or a capitalization thereof, it allows a state to regulate interstate commerce, no matter what name may be affixed to the state action. In any factual sense, this regulation is still a regulation even though it is

[64] 154 U. S. 439, 446–47, 14 Sup. Ct. Rep. 1122 (1894).

[65] *Ibid.*, 439, 447.

[66] *Ibid.*

abundantly justified by the demands of the "harmonious relations between the states and the national government."

The dissent in these two Indiana cases added nothing to what Mr. Justice Bradley had said in the Pullman case. Justices Bradley and Lamar were no longer on the bench. Only Justices Harlan and Brown remained of those who had disapproved of the Pullman case. They dissent also in the Indiana cases, Mr. Justice Harlan writing a brief opinion devoted chiefly to the contention that Indiana had taxed property which had no situs there. He insists that "the board had no authority to impart to the value of railroad track and rolling stock, within the State, any part of the company's various interests and property without the State." [67] With this the majority do not disagree. They deny that the state has done so. They say that the value of the property within the state is enhanced by the fact that it is used in connection with other property without the state. "Each state," says Mr. Justice Brewer, "is entitled to consider as within its territorial jurisdiction and subject to the burdens of its taxes what may perhaps not inaccurately be described as the proportionate share of the value flowing from the operation of the entire mileage as a single continuous road." [68] This he treats as a question distinct from that of whether receipts may be used as a test of the value of property. To this latter question Mr. Justice Harlan devotes no argument, although the general language of his opinion indicates disagreement on this point as well as on the one that he specifically discusses.

Two years later in *Western Union Telegraph Co.* v. *Taggart* [69] the doctrine of the Indiana cases was re-affirmed by an undivided court. The opinion of Mr. Justice Gray consists largely of quotations from previous opinions. It says that "the cost of the property, or of its replacement, is by no means a true measure of its value," [70] and adds that previous authorities have established that the commissioners had the right and the duty, in estimating the value of the property within the state, to take into consideration the franchises granted to the company by sister states, the United States and foreign countries. Plainly a valuation of property by reference

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[67] 154 U. S. 421, 438, 14 Sup. Ct. Rep. 1114 (1894).
[68] 154 U. S. 439, 444, 14 Sup. Ct. Rep. 1122 (1894).
[69] 163 U. S. 1, 16 Sup. Ct. Rep. 1054 (1896).
[70] *Ibid.*, 1, 28.

to its earnings includes the value of all the franchises that help to make the earnings possible.

It now seemed to be firmly established that the state could tax receipts from interstate commerce, provided it did so by using those receipts as a measure of the value of property. But the battle royal was yet to come. Before considering the next phase, however, mention should be made of two decisions which have a bearing on later developments. Both were rendered in 1895. *Erie Railroad* v. *Pennsylvania*[71] allowed a state to tax a railroad on tolls received from other carriers for the use of its line, even though the lessee carrier used the road largely for interstate commerce. The tax was directly on the tolls, but the court held in substance that the tolls were received as rent and not for carriage, and cited for the constitutionality of the exaction the Maine case, the Indiana cases, and *Postal Telegraph Co.* v. *Adams*,[72] decided four months earlier.

The Postal case sustained a tax on an interstate telegraph company assessed at one dollar for each mile of line, which tax was in lieu of all other state, county, and municipal taxes. The company insisted, and Justices Brewer and Harlan agreed with it, that the tax was on the privilege of doing business, and was therefore void as a regulation of interstate commerce and an interference with a federal instrumentality. But the majority of the court thought that the tax, though called a privilege tax, was in substance one on property, and as such was free from fault. "In marking the distinction between the power over commerce and municipal power," observed Chief Justice Fuller, "literal adherence to particular nomenclature should not be allowed to control construction in arriving at the true intention and effect of state legislation." [73] Since the charge, though in the form of a franchise tax, was "arrived at with reference to the value of its property within the State and in lieu of all other taxes," [74] it was held not to amount to a regulation of interstate commerce. This case did not involve taxes measured by receipts and is therefore not pertinent to the problem of valuation. Its relevancy to the present discussion lies in its indication that taxes in lieu of property taxes will receive the

[71] 158 U. S. 431, 15 Sup. Ct. Rep. 896 (1895). Mr. Justice Harlan alone dissented.
[72] 155 U. S. 688, 15 Sup. Ct. Rep. 268 (1895).
[73] *Ibid.*, 688, 700.
[74] *Ibid.*

same consideration that is bestowed on taxes directly on property, and that the validity or invalidity of any particular tax complained of may be dependent on the rôle it plays in the entire fiscal system of the state.

III

In all but one of the cases thus far considered, the property which has been regarded as the subject of taxation consisted of railroad, telephone or telegraph lines and their accoutrements. By far the greater part of such property is indissolubly annexed to the business in which it is engaged. This is true even of the rolling stock of a railroad, if we have in mind the railroad business in its entirety. Nevertheless a practical distinction immediately suggests itself between valuing the tangible property of telephone and telegraph companies on the basis of income, and applying the same rule to the cars of the Pullman Company. If the Pullman company sold its business, but retained its cars, the cars would not become valueless. Undoubtedly they would be worth less than their reproduction cost, if we assume that they have no market as ministers to luxury. They would fall in value to the cost of the less gaudy and expensive coaches which carry the multitude. But the right of way and tracks of a railroad, and the equipment of telegraph and telephone companies would suffer far more from being disassociated from the business which they serve. There is a genuine practical difficulty in valuing this species of property divorced from the profitableness of the uses to which it is put — a difficulty immeasurably greater than that presented by the carriages of the Pullman company.[75] This difference, however, was overlooked by the

[75] In Pullman's Palace Car Co. *v.* Central Transportation Co., 171 U. S. 138, 18 Sup. Ct. Rep. 808 (1898) the Supreme Court had comparatively little difficulty in fixing a rule for the valuation of palace cars which excluded from consideration all elements of value derived from the receipts of the business in which they were used. This case was a suit to recover the value of property delivered under an *ultra vires* contract. The court was urged to consider the market value of the shares of the transferring corporation in determining the value of the property transferred, but it refused to do so, Mr. Justice Peckham declaring: "The market price of the shares of stock in a manufacturing corporation includes more than the mere value of the property owned by it, and whatever is included in that price beyond and outside of the value of its property is a factor which in a case like this cannot be taken into consideration in determining the liability of the cross defendant. . . . The probable prospective capacity for earnings also enters largely into market value, and

minority as well as the majority in *Pullman's Palace Car Co.* v. *Pennsylvania*,[76] in which attention was fixed almost exclusively on the question whether the cars had a taxable situs in the state.

In *Adams Express Co.* v. *Ohio State Auditor*,[77] however, the matter was more fully threshed out. This case sustained Ohio's application of the unit rule to the taxation of interstate express companies. The real estate of these companies was separately appraised, and this appraised value was deducted from the assessment of the company's "entire property" within the state. The statute set forth no explicit instructions for the appraisal of this "entire property," but the companies were required to report the value of their total capital stock, their entire gross receipts, their gross receipts from business done in Ohio, and the length of the lines of rail and water routes over which they did business in Ohio and elsewhere. From this and other data the board was to "arrive at the true value in money of the entire property of said companies within the State of Ohio, in the proportion which the same bears to the entire property of said company, as determined by the value of the capital stock thereof, and the other evidence and rules as aforesaid." [78] For the most accurate statement of what the board did we must go to the brief of Mr. Maxwell in behalf of the companies:

". . . it is manifest that what the board did . . . was not to assess the defendants on the basis of the market value of such of their tangible property as was found within the State of Ohio, and on their moneys and credits within the State, but to treat the companies as owning dividend producing plants, whose value is represented by the market value of their shares, and to assign a portion of that value to the State of Ohio, as being property subject to taxation in that State. The basis of apportionment

future possible earnings again depend to a great extent upon the skill with which the affairs of the company may be managed. These considerations, while they may enhance the value of the shares in the market, yet do not in fact increase the value of the actual property itself. . . . We must therefore take the property that actually was transferred and determine its value in some other way than by this resort to the market price of the stock" (pages 154–56).

It should be noted that a year before this opinion was rendered, the court had forsaken the notion that these state taxes measured by the unit rule were imposed on tangible property alone, and had announced the doctrine that it was the intangible property of the company that was thus being valued.

[76] Note 33, *supra*.

[77] 165 U. S. 194, 17 Sup. Ct. Rep. 305 (1897).

[78] *Ibid.*, 194, 197.

made by the board to Ohio is not disclosed; it was evidently hap-hazard and arbitrary." [79]

Or, as was argued later, "the assessments, while purporting to be upon the property of the plaintiffs within the State, are, in fact, levied upon the plaintiffs' business (which is largely interstate commerce), by placing a fictitious and artificial value upon that property." [80] The result was that wagons, horses, pouches, etc., which one of the companies valued at $23,400, were assessed at $499,-377.60, if that was the property being taxed.

It is difficult to escape from the characterizations of the tax presented in the briefs against its constitutionality. Certainly the value of the horses, wagons, etc., "would be precisely the same" and they "could be bought for the same price — be sold for the same price — be produced and reproduced for the same price — whether the capital stock of the company was 50 per cent below par or 100 per cent above par." [81] It is true also that "under this method of valuation, whether the horses were lame or sound, or old or young, whether the wagons and harness were old or new, was of little consequence." [82] Nor does there seem any valid answer to the position that:

> "To say that this sort of detached and fugitive property, simply because it is employed in the business of an organized express company, is unit property, like a railroad or a telegraph, is only another way of attempting to justify an assessment against the business of a company, under the pretense of assessing its property." [83]

As the brief of Mr. James C. Carter puts it: "The property which, according to the notion under criticism, is taxed, is a pure abstraction having no situs, no existence, even, save in intellectual conception, something which can nowhere be seen or handled or made the subject of action." [84] Later Mr. Carter enumerates the elements which determine the market value of the shares, and contends that a tax on those elements is a tax on the occupation itself.

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[79] 165 U. S. 194, 204–05, 41 L. Ed. 686–687 (1897).

[80] *Ibid.*, 194, 205, *Ibid.*, 687.

[81] *Ibid.*, 194, 215, *Ibid.*, 692.

[82] *Ibid.*

[83] 41 L. Ed. 687 (1897). This excerpt is not contained in the abstract of Mr. Maxwell's brief given in the official reports.

[84] 41 L. Ed. 693 (1897). Not in the official reports.

These contentions of attorneys for the companies seem incontrovertible. Any realistic approach to the genuine issue must concede their validity. If such a tax is to be sustained, it must be because the states *can* tax interstate commerce, provided they do it in approved ways. But the majority position seems poetical rather than realistic. "Doubtless there is a distinction," says Chief Justice Fuller, "between the property of railroad and telegraph companies and that of express companies." [85] The learned justice recognizes that "the physical unity existing in the former is lacking in the latter"; but he discounts the importance of this difference by saying that "there is the same unity in the use of the entire property for the specific purpose, and there are the same elements of value arising from such use." [86] After pointing out that "the cars of the Pullman Company did not constitute a physical unity, and their value as separate cars did not bear a direct relation to the valuation which was sustained in that case," [87] he continues:

"No more reason is perceived for limiting the valuation of the property of express companies to horses, wagons and furniture, than that of railroad, telegraph and sleeping car companies, to roadbed, rails and ties, poles and wires, or cars. The unit is a unit of use and management, and the horses, wagons, safes, pouches and furniture, the contracts for transportation facilities, the capital necessary to carry on the business, whether represented in tangible or intangible property, in Ohio, possessed a value in combination and from use in connection with the property and capital elsewhere, which could as rightfully be recognized in the assessment for taxation in the instance of these companies as the others." [88]

That such value exists is clear. Whether it should rightfully be recognized as a basis for the assessment of state taxes is a question of policy. No criticism is here directed against the judgment that "the States through which the companies operate ought not to be compelled to content themselves with a valuation of separate pieces of property disconnected from the plant as an entirety, to the proportionate part of which they extend protection, and to the dividends of whose owners their citizens contribute." [89] But when

[85] 165 U. S. 194, 221, 17 Sup. Ct. Rep. 305 (1897).

[86] *Ibid.*

[87] *Ibid.*

[88] *Ibid.*

[89] *Ibid.*, 194, 227.

it is insisted that "the taxation is essentially a property tax, and, as such, not an interference with interstate commerce,"[90] the matter is not so clear. This value which the items have in combination and from their use is mainly the value of the combination and the use, and in small part that of the items. And the combination and the use are largely in interstate commerce. The dividends to which Ohio citizens contribute are dividends from interstate as well as intra-state business. The tax is a tax on interstate commerce, and we shall not escape confusion until we recognize it.

The dissenting opinion of Mr. Justice White recognizes the point, but does not dwell upon it. Attention is devoted chiefly to the contention that the tax is on elements of value not located in the state. It is rightly asserted that extra-state values were taken account of in making the assessment. From this is drawn the following conclusion:

> "I reiterate, therefore, that the rule which recognizes that for the purpose of assessing tangible property in one State you may take its full worth and then add to the value of such property a proportion of the total capital stock, is a rule whereby it is announced that the sum of all the property, or an arbitrary part thereof, situated in other States, may be joined to the valuation of property in one State for the purpose of increasing the taxation within that State."[91]

This sentence, isolated from its context, has the vice of not recognizing that values in the taxing state were included in the total, and that the total was then divided in proportions according to a plan that assumed to allocate to the taxing state only that part which rightfully belonged to it. The state certainly adds something to the value of the tangible property within the state, but it does not necessarily add extra-state elements by pooling all values in all the states, and then dipping out the portion which it regards as the contribution of the taxing state. It is by neglecting the division which follows the addition that Mr. Justice White is convinced that "it cannot be said that this vast excess does not embrace property situated outside of Ohio, when both the text of the statute of that State and such text as expounded by the Supreme Court of the State clearly show that the sum of the excess is arrived

[90] 165 U. S. 194, 226, 17 Sup. Ct. Rep. 305 (1897).

[91] *Ibid.*, 194, 240–41.

at by adding to the property in the State the value of property situated outside thereof." [92]

This neglect, however, is logically legitimatized in Mr. Justice White's opinion, because of his insistence that the tangible property of the express companies in Ohio is not part of anything that can be regarded as a unit. If what you add from without the state is unrelated to what you are taxing within the state, the subsequent division, though it may lessen, does not obliterate the evil. The soundness of the dissenting position that Ohio is taxing values in other jurisdictions depends upon the assumption that the Ohio property of express companies is not part of a unit, or upon the fact that more of the whole is assigned to Ohio than rightly belongs to it. Both positions are relied on by the minority. With the second we are not here concerned.[93] The majority recognize fully that there may be an unjustifiable apportionment which serves to draw to Ohio values domesticated elsewhere. Certain kinds of property are not distributable. But the existence of such property, they say, is not to be assumed. "It is for the companies to present any special circumstances which may exist, and, failing their doing so, the presumption is that all their property is directly devoted to their business, which being so, a fair distribution of its aggregate value would be upon the mileage basis." [94] The majority opinion concludes by saying:

"We have said nothing in relation to the contention that these valuations were excessive. The method of appraisement prescribed by the law was pursued and there were no specific charges of fraud. The general rule is well settled that 'whenever a question of fact is thus submitted to the determination of a special tribunal, its decision creates something more than a mere presumption of fact, and if such determination comes into inquiry before the courts it cannot be overthrown by evidence going only to show that the fact was otherwise than as so found and determined.'" [95]

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[92] 165 U. S. 194, 248, 17 Sup. Ct. Rep. 305 (1897).

[93] This is considered in 31 Harv. L. Rev. 772–75. For cases requiring the state to amend the apportionment of interstate values, see Fargo *v.* Hart, 193 U. S. 490, 24 Sup. Ct. Rep. 498 (1904); Louisville & N. R. Co. *v.* Greene, 244 U. S. 522, 37 Sup. Ct. Rep. 683 (1917), and Illinois Central R. Co. *v.* Greene, 244 U. S. 555, 37 Sup. Ct. Rep. 697 (1917).

[94] 165 U. S. 194, 227, 17 Sup. Ct. Rep. 305 (1897).

[95] *Ibid.*, 194, 229.

The major issue in the case was the propriety of the rule of assessment prescribed, rather than the correctness of the particular application. The validity of the rule depends upon a judgment as to the rightfulness of ever including earnings from interstate commerce in assessments for state taxation and upon the subordinate inquiry whether the unit rule is suitable to the property of express companies. The first inquiry had been answered in prior decisions. The second only was novel, and that was novel in form rather than in substance.

Whether the horses and wagons of an express company are integral parts of a larger unit depends upon whether you like to think of them that way. Mr. Justice White does not. "What unity can there be," he asks, "between the horses and wagons of an express company in Ohio with those belonging to the same company situated in the State of New York?" [96] To this, the majority reply that there is a unity of use and management. To the writer, the answer seems a bit of deceptive word painting. Mr. Justice White says that it "in reality declares that a mere metaphysical or intellectual relation between property situated in one State and property found in another creates as between such property a close relation for the purpose of taxation." [97] Though he dislikes the application of the unit rule to railroad and telegraph property, he holds that it "is necessarily predicated upon the physical connection of such property," [98] and insists that it cannot be extended to situations where the unity is not physical. He denies that the cars of the Pullman Company were regarded as items in a unit, and contends that the issue with respect to them was solely whether they had a taxable situs in Pennsylvania, and that the statement that the method of assessment applied to them was "just and equitable" was made "with reference to the facts held to exist in the case before the court." [99] On those particular facts, he finds that the tax in that case was not excessive.

The discussion of "relations," physical and metaphysical, might easily carry us to realms where flight for a lawyer is precarious. A physicist would hardly abandon the search for a continuum as soon as he lost the nexus of iron rails. We are told by many meta-

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[96] 165 U. S. 194, 250, 17 Sup. Ct. Rep. 305 (1897).
[97] *Ibid.* [98] *Ibid.* [99] *Ibid.*

physicians that all relations are intellectual. Whether any posited unity is imaginary or real can provoke endless debate. But these alluring problems can be dismissed as not germane to the present controversy. Since any application of the unit rule which uses as a base the value of total capital stock necessarily imposes taxation on a capitalization of earnings, it seems futile to argue whether a unity of "use and management" differs from a physical unity. The fact that the tangible property of the express companies in Ohio had an independent, easily assessable value makes it less easy to conceal the fact that the express business was being taxed. But the disguise seems apparent enough in the case of railroads and telegraphs. There is no denying that part of Mr. Justice White's opinion which says that it cannot be "contended that the tax here involved is not a tax on interstate commerce, in view of the fact that, from the nature of the criteria of value adopted, an aliquot part of the avails and receipts of the company of every kind is added to the taxing value in the State of Ohio."[100] There is but one answer to the query he propounds:

"How, I submit, can it now be announced that there is an imaginary unity between personal property widely separated because that property has a common owner, without, at the same time, reversing the settled adjudications of this court on the subject of the power of a State to tax the earnings from interstate commerce?"[101]

The answer is that the taxing of such earnings is accomplished in a different way from the ways previously declared unconstitutional. Whether the difference makes a difference is another question. The court's way out of such difficulties is to distinguish between direct and indirect burdens on interstate commerce. But such distinctions have to be fortified by something more than affixing labels. Not infrequently the labels are masks for changed views of policy. Yet in many cases they express substantial differences of effect. Whether they do in the present instance will be considered later.

The opinion of Chief Justice Fuller hardly touches the question. But the case did not end here. The attorneys for the companies presented a petition for a rehearing, fortified by elaborate argu-

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[100] 165 U. S. 194, 248–49, 17 Sup. Ct. Rep. 305 (1897).

[101] *Ibid.*, 194, 251–52.

ment. They concede the propriety of assessing railroad, telephone and telegraph companies by the unit rule, for the reason that there is no other feasible method of finding the value of property of this nature. But horses and wagons, they say, have an easily ascertainable pecuniary value. They are worth no more to an express company than to anyone else. It is improper to impute to them the earnings of the business in which they are used, for they might be dispensed with and the earnings still continue. By hiring others to care for local deliveries, and by renting furniture, etc., instead of owning it, the express companies might divest themselves of all that Ohio purported to tax, and could still carry on the business with substantially equal success. The small amount of the tangible property in Ohio contributes almost nothing to the values which Ohio has assessed against it.[102]

To this, Mr. Justice Brewer, in denying the motion for a reargument,[103] answers that what Ohio was taxing was not alone the tangible property of the company in Ohio, but the intangible as well.[104] He does not appear to insist that the Ohio legislature

[102] The petition for a rehearing is printed, apparently in full, in 166 U. S. 185, 186–217 and 41 L. Ed. 966–76.

[103] Adams Express Co. *v.* Ohio State Auditor, 166 U. S. 185, 17 Sup. Ct. Rep. 604 (1897).

[104] Mr. Justice Miller had previously regarded taxes assessed by the unit rule as taxes on intangible property in State Railroad Tax Cases, note 23, *supra*. See page 238, 239, *supra*. In these cases, however, the interstate commerce question was not raised. On the same day that the opinion denying a rehearing in the Adams Express case was handed down, the court rendered two other decisions involving the same point.

Adams Express Co. *v.* Kentucky, 166 U. S. 171, 17 Sup. Ct. Rep. 527 (1897) sustained what purported to be a tax on the franchises of the company, measured in the same way as the Ohio taxes. Since the Adams Express Co. was a joint-stock company without any corporate franchise, the minority contended that, even if the doctrine of the Ohio cases were accepted, it did not apply here, because the only franchise that could be conceived of as the subject of taxation was one to be inferred from the proposition that the right to do interstate commerce in Kentucky resulted from the assent of the state, and that such a proposition was obviously opposed to the settled course of decision. Some reliance, too, was placed on the fact that the Ohio tax was at the rate of $250 per mile while the Kentucky tax was at the rate of $764 per mile. The majority, however, called the tax in effect one on intangible property, Chief Justice Fuller observing: "We agree with the Circuit Court that it is evident that the word 'franchise' was not employed in a technical sense, and that the legislative intention is plain that the entire property, tangible and intangible, of all foreign and domestic corporations, and all foreign and domestic companies possessing no franchise, should be valued as an entirety, the value of the tangible property be deducted, and the value

realized the fact. The point is introduced by saying that the argument on behalf of the companies that their horses, wagons, etc., constitute their only property in Ohio "practically ignores the existence of intangible property, or at least denies its liability for taxation." [105] "To ignore this intangible property," continues the opinion, "or to hold that it is not subject to taxation at its accepted value, is to eliminate from the reach of the taxing power a large portion of the wealth of the country." [106] The learned justice points out the existence of an excess of value over that of tangible property, and asks: "What gives this excess of value?" [107] The answer is that it is "obviously the franchises, the privileges the company possesses — its intangible property." [108]

This is not to be quarreled with, but what perplexes is the task of reconciling this with the earlier statement that "no state can interfere with interstate commerce through the imposition of a tax, by whatever name called, which is in effect a tax for the privilege of transacting such commerce." [109] What Mr. Justice Brewer seems to regard as a resolution of the difficulty seems to the writer nothing but a contradiction of the earlier statement. That statement was given as the repeated affirmation of the court. It is followed by the sentence: "And it has as often been affirmed that such restriction on the power of a State to interfere with interstate commerce does not in the least abridge the right of a State to tax at

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of the intangible property thus ascertained . . . should be assessed on the basis of their lines within and without the State." (166 U. S. 150, 180.)

Henderson Bridge Co. *v.* Kentucky, 166 U. S. 150, 17 Sup. Ct. Rep. 532 (1897), sustained a similar tax on that part of the intangible property of a company owning an interstate bridge which was deemed to be within Kentucky. Chief Justice Fuller declared that the tax clearly was not on the interstate business carried on over the bridge, because the bridge company did not transact any such business, it being carried on by others who paid tolls for the use of the bridge, thus bringing the case within Erie Railroad *v.* Pennsylvania, note 71, *supra.* Mr. Justice White distinguished the Erie case because the railroad there involved lay wholly within the limits of a single state. The pith of his dissent is as follows: "It being beyond dispute, therefore, that the sum of taxation in this case was fixed almost exclusively by the gross earnings from interstate commerce, who, may I ask, can point out the distinction between taxing the gross earnings derived from interstate commerce and taxing a valuation based on such earnings?" (166 U. S. 150, 165).

The division of opinion in these two cases was the same as that in the Ohio cases.

[105] 166 U. S. 185, 218, 17 Sup. Ct. Rep. 604 (1897.)

[106] *Ibid.*, 185, 219.

[107] *Ibid.*, 185, 220.

[108] *Ibid.*

[109] *Ibid.*, 185, 218.

their full value all the instrumentalities used for such commerce." [110] The contradiction plainly appears when it is said that intangible property is taxable and that "it matters not in what this intangible property consists — whether privileges, corporate franchises, contracts or obligations." [111]

The rest of Mr. Justice Brewer's opinion consists of forceful argument why this intangible property should be taxed for what it is actually worth. "Substance of right demands that whatever be the real value of any property, that value may be accepted by the State for the purpose of taxation, and this ought not to be evaded by any mere confusion of words." [112] Accumulated wealth, it is said, will laugh at the crudity of tax laws which reach only tangible property and ignore that which is intangible.[113] After pointing out that the tangible property of the Adams Express Company was valued at about $4,000,000, while its stock would sell for over $16,000,000, Mr. Justice Brewer continues:

"But what a mockery of substantial justice it would be for a corporation, whose property is worth to its stockholders for the purpose of income and sale $16,800,000, to be adjudged liable for taxation upon only one fourth of that amount. The value which property bears in the market, the amount for which its stock can be bought and sold, is the real value. Business men do not pay cash for property in moonshine or dreamland. They buy and pay for that which is of value in its power to produce income, or for purposes of sale." [114]

With this let us cordially agree. Ohio was not venturing into moonshine or dreamland to find the value which it taxed. If its method of apportionment was just, it was not venturing outside of Ohio.[115] But its excursion into the realm of the intangible was an

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[110] 166 U. S. 185, 218, 17 Sup. Ct. Rep. 604 (1897).

[111] *Ibid.*, 185, 219.

[112] *Ibid*,, 185, 221.

[113] *Ibid.*

[114] *Ibid.*, 185, 222.

[115] On the situs of this property without location, Mr. Justice Brewer said: "Where is the situs of this intangible property? Is it simply where the home office is, where is found the central directing thought which controls the workings of the great machine, or in the State which gave it its corporate franchise; or is that intangible property distributed wherever its tangible property is located and its work is done? Clearly, as we think, the latter. . . . But the franchise to be is only one of the franchises of a corporation. The franchise to do is an independent franchise, or rather a combina-

entry into the field of interstate commerce, and the Supreme Court would have done well to recognize it more frankly and to find a way to justify it that breathed none of the atmosphere of that moonshine and dreamland which is referred to as the bourne in which business men do not invest.

Such justification is by no means difficult. The brief of Mr. Carter on behalf of the express companies gave the court a clue to the most solid of reasons for sustaining the tax which that brief condemned. For Mr. Carter was a jurist as well as an advocate. And in the present instance he analyzed the problem for us most helpfully. The basis for the general doctrine of the immunity of interstate commerce from state taxation, he states as follows:

"There is no constitutional provision in terms forbidding the States to impose burdens by way of taxation upon interstate commerce. The prohibition is a necessary implication arising from the fact that the subject-matter is one placed exclusively under the sovereign control of Congress, and the imposition of burdens upon it by the States, whether by taxation or otherwise, would be a denial of that sovereignty and false assumption by the States of a power over it, which, if it existed, might be so exercised as to destroy it." [116]

And then he adds the significant qualification:

"There is one necessary exception to the rule that the States cannot tax interstate commerce. Inasmuch as the existence of the States is necessary to the existence of interstate commerce, that ordinary system of taxation which is necessary to the existence of the States, namely, taxation upon all property within them, must be permitted, and the property employed in interstate commerce is not to be exempted. This exception is, indeed, rather apparent than real; for where no burden can be put upon property employed in interstate commerce without being at the same time put upon all other property, interstate commerce is not really burdened. Were it not subject to taxation in this form the effect would be to confer upon it an affirmative advantage equivalent to a pecuniary bounty equal to the amount of the tax from which it is exempted." [117]

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tion of franchises, embracing all things which the corporation is given power to do, and this power to do is as much a thing of value and a part of the intangible property of the corporation as the franchise to be. Franchises to do go wherever the work is done." (166 U. S. 185, 223–24).

[116] 165 U. S. 194, 217, 41 L. Ed. 694 (1897.)

[117] *Ibid.*, 194, 217–18.

Manifestly, what is true of property used in interstate commerce is equally true of business that is interstate commerce. If such business is exempted from burdens which local business has to bear, it is thereby given a bounty to the extent of the exemption. Mr. Carter's point is that a tax is not a burden on interstate commerce unless it discriminates against that commerce. It would probably be safer to say that such burden on interstate commerce as non-discriminatory taxation may impose is not sufficiently serious to be accounted a regulation. Such taxation is forbidden by no explicit language in the Constitution. The exemption of interstate commerce from state taxation arises by implication only, and the implication should not be carried to the point of compelling the states to confer positive benefits on interstate commerce by discriminations in its favor.

Mr. Carter apparently appreciated the applicability of his concession to taxes on business, for he hastens to add that "a tax in any other form [than a tax on property] cannot be thus equalized over all private interests, and, if allowed, would be, or might easily be made to be, an especial burden." [118] Here is the crucial difficulty in the problem. In Ohio, express companies were taxed on the basis of their income-producing capacities, while many other businesses were assessed on a less onerous basis. Was there not therefore necessarily a discrimination against the express companies and the interstate commerce which they carried on? In one sense, of course, there is always discrimination, wherever there is difference of treatment. The requirement of absolute uniformity is, however, utterly impracticable. The rule of "reasonable classification" which the court has been compelled to adopt in applying the equal-protection clause [119] seems necessary also in passing upon issues of alleged discrimination raised under other constitutional clauses. But the Express cases were wisely decided only if they can be brought within the rule of reasonable classification.

The theories of both the majority and the minority avoided explicit analysis of this element in the situation. Chief Justice Fuller quoted a portion of the opinion of the state court which made the point that the earning capacity of real estate determines its assessable

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[118] 165 U. S. 194, 218, 41 L. Ed. 694 (1897).

[119] See Missouri *v.* Lewis, 101 U. S. 22 (1879).

value.[120] But the tax in question was not on the real estate of the express companies, for that was assessed separately, and the assessment then deducted from the value of the "total property" determined by the use of the unit rule. Mr. Justice White's dissenting opinion touches upon what ought to be the determining element in the case, when it points out that if the unit rule is good for express companies, it ought also to be applied to bankers and merchants. But this is adduced in support of the contention that the tax is not confined to tangible property within the state but falls also on all kinds of property without the state. That the assessment on the express companies greatly exceeded "the true value in money" of their tangible chattels within the state was fully recognized in the opinion denying a rehearing, in which this excess was called the intangible property of the company. What should then have been discussed was the question whether the intangible property of the express companies was taxed no more heavily than that of others.

The answer to the question depends upon whether similar business taxes were imposed on other businesses. Only by a general state-wide income tax can differences of treatment be avoided. And Ohio had no general income tax. Certainly the intangibles of the express companies were discriminated against in favor of intangibles enjoyed by many other businesses. But the doctrine of reasonable classification ought to go far enough to say that it is not necessary to treat express companies in the same way as other businesses that come into no competition with them. It can hardly be called a discrimination against interstate commerce to tax express companies more heavily than farmers. On the other hand, express companies may suffer if merchants escape what they must endure. An increase in the cost of interstate transportation by taxation of express companies may well reduce the volume of that kind of interstate commerce to the resulting increase of sales over the counters of local merchants. The Ohio tax on express companies might discriminate against interstate commerce even though similar taxes were imposed on all engaged in any form of transportation, intra-state or interstate. But the court was excused from considering these possibilities in dealing with the Ohio cases, since they were not specifically pressed and supported by evidence.

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[120] 165 U. S. 194, 225, 17 Sup. Ct. Rep. 305 (1897).

It may well insist that the complainants are under the same burden to establish the existence of discrimination as to show flaws in the rule of apportionment. But it does not appear that the materiality of the point was recognized.

This of course does not establish that the cases were unwisely decided. A court cannot insist on an ideal system of state taxation, if such a thing can exist outside the minds of the doctrinaire. A rough approximation to fair treatment of interstate commerce is all that can reasonably be required. It does not appear that the interstate business of express companies was in any way discriminated against in favor of any direct competitor engaged solely in local carriage. Such discrimination against interstate commerce as the entire taxing system of the state may have resulted in, was probably remote, indirect, and practically negligible. The Ohio taxes and others like them seem to have spared the express companies and their interstate business for other foes to devour. What Mr. Justice Brewer has to say about the possibility that the decision may open the door to injustice through the conflicting action of different states applies as well to the possibility that Ohio had laid a heavier hand on some interstate commerce than on some that was local. "Such possibilities," he says, "do not equal the wrong which sustaining the contention of the appellant would at once do." [121] Fine spun theories about possible discrimination may be dismissed in the same way that Mr. Justice Brewer deals with what he calls fine spun theories about situs in the paragraph with which he closed his opinion:

> "In conclusion, let us say that this is eminently a practical age; that courts must recognize things as they are and as possessing a value which is accorded to them in the markets of the world, and that no fine spun theories about situs should interfere to enable these large corporations, whose business is carried on through many States, to escape from bearing in each State such burden of taxation as a fair distribution of the actual value of their property among those States requires." [122]

But a practical age demands not only practical decisions but practical opinions to support them. The distinction between the intangible property of an interstate carrier and its franchises and business and receipts is that the intangible property, as Mr. Justice

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[121] 166 U. S. 185, 225, 17 Sup. Ct. Rep. 604 (1897). [122] *Ibid.*

Brewer estimates it, is a conception that embraces the economic value of all the elements from which it is distinguished. For all his professed practicality, Mr. Justice Brewer reaches his goal by arbitrary categories and by distinctions in nomenclature which are not distinctions in reality. In escaping from the difficulties inherent in the notion that chattels are necessarily worth a capitalization of what may be earned by their use, even though they are easily divorced from that use and though substitutes for the use are readily available, the learned justice gets into new difficulties by insisting that a tax on the value of an interstate business is any the less a tax on that business because it is called a tax on intangible property. Had the Supreme Court recognized the Ohio tax on express companies for what it really was, and held that Ohio could not apply this method of assessment to any interstate business unless it also applied similar methods to all other businesses, we might not have had to wait so long for the beginnings of the fiscal reform that disregards intangibles as a subject of taxation and looks to income as the best expression of the values thus disregarded, and therefore as the most satisfactory and equitable subject from which to derive the necessary funds for governmental purposes.

(*To be continued.*)

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INDIRECT ENCROACHMENT ON FEDERAL AUTHORITY BY THE TAXING POWERS OF THE STATES.[1] VI

II. Regulations of Interstate Commerce (*continued*)

2. *Taxes not Discriminating Against Interstate Commerce* (continued)

C. Taxes on Acts, Occupations, or Income.

THIS study has now reached a point where the remaining cases can most profitably be considered under the somewhat omnibus rubric chosen for this section. We have seen that the Supreme Court has not been meticulous in inquiring whether the statute under which a tax is imposed calls it a tax on property or on a franchise or on capital stock or "on the corporation itself." If a rose by another name would smell sweeter, it has sometimes been rechristened and found sweet enough to accept. "Literal adherence to particular nomenclature should not be allowed to control construction in arriving at the true intention and effect of state legislation,"[2] observed Chief Justice Fuller in a passage already quoted.[3] In spite of the rule that earnings from interstate commerce may not be taxed directly, such earnings have been accorded recognition in assessing the amount of taxes on privileges or property. Most of the cases have dealt with valuations that regarded a capitalization of net earnings.[4] But *Maine* v. *Grand Trunk Railway*

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[1] For preceding instalments of this discussion see 31 Harv. L. Rev. 321–72 (January, 1918); *Ibid.*, 572–618 (February, 1918); *Ibid.*, 721–78 (March, 1918); *Ibid.*, 932–53 (May, 1918); and 32 Harv. L. Rev. 234–65 (January, 1919).

[2] Postal Telegraph Cable Co. *v.* Adams, 155 U. S. 688, 700, 15 Sup. Ct. Rep. 268 (1895).

[3] 32 Harv. L. Rev. 249.

[4] The Delaware Railroad Tax, 18 Wall. (U. S.) 206 (1873), 32 Harv. L. Rev. 236; Western Union Telegraph Co. *v.* Massachusetts, 125 U. S. 530, 8 Sup. Ct. Rep. 961 (1888), 32 Harv. L. Rev. 239; Massachusetts *v.* Western Union Telegraph Co., 141 U. S. 40, 11 Sup. Ct. Rep. 889 (1891), 32 Harv. L. Rev. 239; Pullman's Palace Car Co. *v.* Pennsylvania, 141 U. S. 18, 11 Sup. Ct. Rep. 876 (1891), 32 Harv. L. Rev. 240; Cleveland, C., C. & St. L. Ry. Co. *v.* Backus, 154 U. S. 439, 14 Sup. Ct. Rep. 1122 (1894), 32 Harv. L. Rev. 244; Pittsburgh, C. C. & St. L. Ry. Co. *v.* Backus, 154 U. S. 421, 14 Sup. Ct. Rep. 1114 (1894), 32 Harv. L. Rev. 248; Western Union Telegraph

Co.,[5] *Erie Railroad* v. *Pennsylvania*[6] and *Henderson Bridge Co.* v. *Kentucky*[7] accepted the measure of gross earnings, some or all of which were from interstate commerce.

To an untutored mind, taxes measured by gross earnings are a form of income taxes; and from now on it will be convenient to treat them as such, no matter by what name courts or legislatures may choose to call them. It will help towards seeing things as they are, if we emulate the attitude of Mr. Justice Holmes in his illuminating essay on "The Path of the Law,"[8] in which, in order to point to the distinction between law and morals, he looks to the mental and emotional processes of the "bad man." For our purposes we may invoke that more estimable person whom we know as the "business man." This pecuniary creature will think that he is taxed on his income when his tax varies directly with the ups and downs of his income, even though judges and scholars may assure him that he is taxed on something entirely different. He will be primarily interested in knowing when and why such a tax must be paid and when and why it can be escaped. He will care less what such a tax is called by those versed in legal niceties than what its effect will be on his balance sheet. To him, at least, we may look for forgiveness for such imperfect coördination as may be indulged in by treating together all taxes measured by income, whether they are formally taxes on income or taxes on occupations, franchises or property.

For a decade after the Ohio Express cases,[9] there was comparative quiet among those subjected to taxes that took account of earnings from interstate commerce. *Parke, Davis & Co.* v. *Roberts*[10] sustained a tax on that part of the capital stock of a foreign corporation which was regarded as employed within the state, although

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Co. *v.* Taggart, 163 U. S. 1, 16 Sup. Ct. Rep. 1054 (1896), 32 Harv. L. Rev. 248; Adams Express Co. *v.* Ohio State Auditor, 165 U. S. 194, 17 Sup. Ct. Rep. 305 (1897), 166 U. S. 185, 17 Sup. Ct. Rep. 604 (1897), 32 Harv. L. Rev. 251; Adams Express Co. *v.* Kentucky, 166 U. S. 171, 17 Sup. Ct. Rep. 527 (1897), 32 Harv. L. Rev. 258, note 104.

[5] 142 U. S. 217, 12 Sup. Ct. Rep. 121 (1891), 31 Harv. L. Rev. 579–80, 32 Harv. L. Rev. 242.

[6] 158 U. S. 431, 15 Sup. Ct. Rep. 896 (1895), 32 Harv. L. Rev. 249.

[7] 166 U. S. 150, 17 Sup. Ct. Rep. 532 (1897), *Ibid.*, 258, note 104.

[8] 10 Harv. L. Rev. 457–78.

[9] Adams Express Co. *v.* Ohio State Auditor, note 4, *supra*.

[10] 171 U. S. 658, 19 Sup. Ct. Rep. 58 (1898).

the corporation was engaged partly in interstate commerce and the tax was graduated according to the annual dividends. Mr. Justice White did not sit, and Justices Harlan and Brown dissented; but their objections were confined to what they regarded as a discrimination against interstate commerce because the tax was imposed only on corporations not "wholly engaged" in business within the state.[11]

In 1900 the court unanimously sustained a tax on the total capital stock of a domestic corporation owning an interstate bridge, which was in addition to a tax on its tangible property.[12] Three years later *Western Union Telegraph Co.* v. *Missouri* [13] sanctioned Missouri's application of the unit rule to the property of the Western Union within the state. Mr. Justice Brewer concurred only in the result, and Justices White and Peckham dissented; but whether on the main point of the case or on the subordinate one that a complaint against discriminatory overvaluation cannot be raised in an action at law, does not appear, as there is no dissenting opinion.

Meanwhile other cases had sanctioned assessments of property employed in interstate commerce, which did not take account of

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[11] The majority recognized that "if the object of the law in question was to impose a tax upon products of other States while exempting similar domestic goods from taxation, there might be room to contend that such a distinction was constitutionally objectionable as tending to affect or regulate commerce between the States" (171 U. S. 658, 662, 19 Sup. Ct. Rep. 58). But the tax was said not to be directly on the articles brought into the state or on their sale, nor on property in other states. It was conceded that the tendency of the law might be "to encourage manufacturing corporations which seek to do business in that State to bring their plants into New York" (*Ibid.*, 665); but the absence of any distinction between domestic and foreign corporations was thought to cure any evil lurking in this design.

The majority cannot be said to have dealt satisfactorily with the contentions of the minority. Mr. Justice Shiras refers to the Ohio Express cases and others to show "the distinction between corporations organized to carry on interstate commerce, and having a quasi-public character, and corporations organized to conduct strictly private business" (*Ibid.*). The drug concern before the court was said to come within the doctrine of Paul *v.* Virginia, 8 Wall. (U. S.) 168 (1869), and Horn Silver Mining Co. *v.* New York, 143 U. S. 305, 12 Sup. Ct. Rep. 403 (1892), and therefore to be subject to the arbitrary power of the state with respect to any exaction on its local business. This ground of the decision is now completely undermined by Looney *v.* Crane Co., 245 U. S. 178, 38 Sup. Ct. Rep. 85 (1917), 31 Harv. L. Rev. 601–18.

[12] Keokuk & Hamilton Bridge Co. *v.* Illinois, 175 U. S. 626, 20 Sup. Ct. Rep. 205 (1900).

[13] 190 U. S. 412, 23 Sup. Ct. Rep. 730 (1903).

earnings. Two of these were Colorado[14] and Utah[15] assessments of refrigerator cars, which determined by count the average number of cars within the state and fixed a valuation of $250 per car. Two were *ad valorem* assessments of interstate bridges.[16] *Western Union Telegraph Co.* v. *New Hope*[17] and *Atlantic & Pacific Telegraph Co.* v. *Philadelphia*[18] sanctioned license fees on telegraph companies based on the number of poles and of miles of wire, in spite of the fact that it was conceded that the exactions might yield some surplus over the cost of supervision on which the license was professedly based. The state and municipal requirements sustained in these cases make it clear that it is not necessary to measure property taxes by a capitalization of earnings. Since it is feasible to assess cars and bridges and telegraph lines in ways that do not make the tax vary with the income from their use, it is difficult to contest the position that taxes based on a valuation of capital stock or on dividends or gross receipts are in substance a species of income taxes. The sublimation by which earnings are transmuted into a valuation of capital stock need not deceive us.

I. *Taxes Measured by Gross Receipts.*

There is no dispute that gross receipts from interstate commerce are not taxable directly as such.[19] The Supreme Court will not swallow a gross-receipts pill unless it is fiction-coated. Our task is to discover what coating is necessary to make it palatable. In the section on taxes on privileges we have already dealt with *Maine* v. *Grand Trunk Railway Co.*,[20] which sustained a gross-receipts

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[14] American Refrigerator Transit Co. *v.* Hall, 174 U. S. 70, 19 Sup. Ct. Rep. 599 (1899).

[15] Union Refrigerator Transit Co. *v.* Lynch, 177 U. S. 149, 20 Sup. Ct. Rep. 631 (1900).

[16] Pittsburgh, C. C. & St. L. Ry. Co. *v.* Board of Public works, 172 U. S. 32, 19 Sup. Ct. Rep. 90 (1898); Henderson Bridge Co. *v.* Henderson City, 173 U. S. 592, 19 Sup. Ct. Rep. 553 (1899).

[17] 187 U. S. 419, 23 Sup. Rep. 204 (1903).

[18] 190 U. S. 160, 23 Sup. Ct. Rep. 817 (1903).

[19] Fargo *v.* Michigan, 121 U. S. 230, 7 Sup. Ct. Rep. 857 (1887); Philadelphia & Southern Mail S. S. Co. *v.* Pennsylvania, 122 U. S. 326, 7 Sup. Ct. Rep. 1118 (1887); Western Union Telegraph Co. *v.* Alabama Board of Assessment, 132 U. S. 472, 10 Sup. Ct. Rep. 161 (1889); Western Union Telegraph Co. *v.* Texas, 105 U. S. 460 (1881).

[20] 142 U. S. 217, 12 Sup. Ct. Rep. 121 (1891), 31 HARV. L. REV. 579–80, 32 HARV. L. REV. 241.

tax nominally on the privilege of exercising corporate franchises within the state. The theory of the majority was that the measure of the tax did not matter, as the state had absolute and arbitrary power over such privileges as it might in its discretion grant or withhold. In 1910 this theory was abandoned,[21] so that the Maine case must now find some other leg to stand on or must fall. We shall see that the necessary prop was supplied [22] two years before the original foundation was destroyed.

At the same term in which the Maine case was decided, *Ficklen* v. *Shelby County Taxing District* [23] sustained a gross-receipts tax without the justification of arbitrary power over corporate privileges. The tax was not in terms on the gross receipts and thus was distinguished by the majority from taxes levied on receipts from interstate commerce "as such." Mr. Justice Harlan was the only one to dissent. He insisted that receipts from interstate commerce cannot be included in the measure of any tax on an occupation. He professed to believe that his eight colleagues would have agreed with him, had the Taxing District expressly required that a license to do a general commission business should be withheld until the applicant had paid a percentage of his gross commissions from interstate sales during the preceding year. The different method which had been adopted was characterized as "a very clever device to enable the Taxing District of Shelby County to sustain its government by taxation upon interstate commerce."[24]

This so-called "device" took the form of a requirement that all who desired to do business as general brokers, etc., should take out a license, pay a fee of $50, and in addition pay ten cents for every $100 of capital invested in the business, or, in the absence of such invested capital, give a bond conditioned on the payment of two and one half per cent on the gross commissions during the year for which the license was desired. Complainants had no capital. They had given the required bond. It chanced that the business of Ficklen during the year 1887 had consisted entirely of negotiating interstate sales, and that nine-tenths of the sales and commissions

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[21] Western Union Telegraph Co. *v.* Kansas, 216 U. S. 1, 30 Sup. Ct. Rep. 190 (1910); Pullman's Palace Car Co. *v.* Kansas, 216 U. S. 56, 30 Sup. Ct. Rep. 232 (1910).

[22] In Galveston, H. & S. A. Ry. Co. *v.* Texas, 210 U. S. 217, 28 Sup. Ct. Rep. 638 (1908), considered *infra*, 385, et seq.

[23] 145 U. S. 1, 12 Sup. Ct. Rep. 810 (1892).

[24] *Ibid.*, 28.

of the other complainant had been interstate. Both sought a license for the ensuing year without fulfilling the obligation assumed in the bond given the preceding year. The court found that the subject taxed was the privilege of doing a general brokerage business, including intra-state as well as interstate, and that it was therefore taxable. It recognized that a different question would have arisen if the complainants "had not undertaken to do a general commission business, and had taken out no licenses therefore, but had simply transacted business for non-resident principals."[25]

Here obviously is the simple case of a tax on local business, measured by gross receipts from all business, with the only additional element that this measure of receipts was to be used only in case the business was done without capital. Had the complainants seen fit to employ $100 of capital, they would have paid ten cents each instead of a percentage of their receipts. This element in the case was accorded weight, for Chief Justice Fuller remarked:

"We presume it would not be doubted that, if the complainants had been taxed on capital invested in the business, such taxation would not have been obnoxious to constitutional objection; but because they had no capital invested, the tax was ascertained by reference to the amount of their commissions, which when received were no less their property than their capital would have been."[26]

It is to be noted, however, that this observation appears in the final paragraph of the opinion, and that the preceding discussion conveys no hint that the tax on the gross receipts would not have been quite as proper if it had not been the alternative of a tax on capital. After quoting from Mr. Justice Bradley's opinion in *Philadelphia & Southern M. S. S. Co.* v. *Pennsylvania*[27] that "the corporate franchises, the property, the business, the income of corporations created by a State may undoubtedly be taxed by the State,"[28] Chief Justice Fuller adds that "this of course is equally true of the property, the business, and the income of individual citizens of a State."[29] And later, after discussing *Maine* v. *Grand Trunk Railway Co.*,[30] he declares:

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[25] 145 U. S. 24, 12 Sup. Ct. Rep. 810 (1892).

[26] *Ibid.*, 24.

[27] Note 19, *supra*.

[28] 122 U. S. 326, 345, 7 Sup. Ct. Rep. 1118 (1887), quoted in 145 U. S. 1, 22, 12 Sup. Ct. Rep. 810 (1892).

[29] *Ibid.*

[30] Note 20, *supra*.

"Since a railroad company engaged in interstate commerce is liable to pay an excise tax according to the value of the business done in the State, ascertained as above stated, it is difficult to see why a citizen doing a general business at the place of his domicil should escape payment of his share of the burdens of municipal government because the amount of his tax is arrived at by reference to his profits."[31]

The Chief Justice insists that "this tax is not on the goods or on the proceeds of the goods, nor is it a tax on nonresident merchants,"[32] and then invokes the familiar and convenient slogan that "if it can be said to affect interstate commerce in any way it is incidentally, and so remotely as not to amount to a regulation of such commerce."[33]

By this decision Shelby County appears to have achieved indirectly what it would be forbidden to attain directly. It used receipts on which it could not impose a tax as the measure of a tax on something else. It was on the nature of that something else that the court fixed its attention. Had the county declared that no business at all might be done without a license, a broker would then come within the fangs of the law by doing interstate commerce alone, and the tax would have been held to be one on a subject that is interstate commerce itself.[34] But here it was the broker, and not county, that wrapped interstate and local commerce in the same package. The Chief Justice admonishes Mr. Ficklen that he has only himself to blame for his predicament, since he asked for a license to do a "general" business, and did not restrict his professions to interstate business.

"The tax was not laid on the occupation or business of carrying on interstate commerce, or exacted as a condition of doing any particular commission business; and complainants voluntarily subjected themselves thereto in order to do a general business."[35]

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[31] 145 U. S. 1, 24, 12 Sup. Ct. Rep. 810 (1892).

[32] *Ibid.*, 24.

[33] *Ibid.*, 24.

[34] Robbins *v.* Shelby County Taxing District, 120 U. S. 489, 7 Sup. Ct. Rep. 592 (1887); Leloup *v.* Port of Mobile, 127 U. S. 640, 8 Sup. Ct. Rep. 1380 (1888); Crutcher *v.* Kentucky, 141 U. S. 47, 11 Sup. Ct. Rep. 851 (1891); Williams *v.* Talladega, 226 U. S. 404, 33 Sup. Ct. Rep. 116 (1912); Barrett *v.* New York, 232 U. S. 14, 34 Sup. Ct. Rep. 203 (1914). In all but the first of these the complainant was engaged in local as well as interstate commerce, and was therefore taxable under a statute or ordinance properly drawn.

[35] 145 U. S. 1, 22, 12 Sup. Ct. Rep. 810 (1892).

Thus the court preserved the fiction that interstate commerce cannot be taxed, and contented itself with finding that the "subject" on which the burden was imposed was not interstate commerce and in holding that therefore a tax on that subject is not a tax on interstate commerce.

The next gross-receipts taxes to come before the court were ones imposed by North Dakota on the Northern Pacific Railroad. A statute of 1883 provided that "all railroad companies, except railroads operated by horse power, owned and operated within the territory, should pay two per centum on the gross earnings of their railroads for a period of five years, and thereafter three per centum on the gross earnings, in lieu of all other taxes upon said railroads and the capital stock thereof."[36] The law was changed in 1889 so as to give the road the option of paying the gross-earnings tax or of having its property subjected to *ad valorem* assessments like those on other property in the state. The Northern Pacific accepted the Act of 1889, but did not pay in full the gross-earnings tax due in that year. Some of its lands were assessed for local taxation, and the company brought a bill to enjoin their sale for nonpayment of the tax. Relief was denied in *Northern Pacific R. R. Co.* v. *Clark*[37] on the ground that the company had no standing in equity until it had paid what was due under one or the other of the two modes of assessment. The road had contended that it was liable under neither. It argued that by accepting the Act of 1889 it gained exemption from ordinary taxation on its lands, and that it was excused from paying the gross-receipts tax by reason of the subsequent repeal of the statute under which it was imposed. The court held, however, that the Act of 1889 contemplated no exemption of any property, but merely offered two optional modes of assessment of that property. Though the case passed on no constitutional question, it figures in the family tree of the distinction subsequently drawn between taxes on gross receipts in addition to other demands and the same taxes as a substitute for other impositions.

Other lands of the railroad had been sold for nonpayment of local taxes assessed prior to 1889. These were lands not adjacent

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[36] Stated by Mr. Justice Jackson in Northern Pacific R. R. Co. *v.* Clark, 153 U. S. 252, 264, 14 Sup. Ct. Rep. 809 (1894).

[37] 153 U. S. 252, 14 Sup. Ct. Rep. 809 (1894).

to the right of way, which had been taxed locally on the assumption that the compulsory gross-earnings tax imposed by the law of 1883 was in lieu only of taxation on lands which actually contributed to the earnings through their use in the business. In *McHenry* v. *Alford*[38] the receivers of the road brought a bill to have the tax deeds declared invalid, since the gross-receipts tax had been fully paid. The purchasers defended on the grounds that the gross-receipts tax had no bearing on the local taxation of lands not adjacent to the right of way and, further, that it was not a valid tax and so could not operate to exempt the lands from other demands. Neither position was accepted by the court, although only the first was formally passed upon. As to this it was declared that, since the lands not adjacent to the right of way had been pledged for the payment of bonds issued to build and equip the road, and thus helped to make the earnings possible, their relation to the road and its operation was such that it was a proper classification to include them in all the property of the company which was relieved from local assessments and subjected to the gross-earnings tax, and that this was what the statute intended.[39]

The court was relieved from the necessity of passing explicitly on the question whether the gross-earnings tax was unconstitutional as a regulation of interstate commerce, because it found that the Act of 1889 was in the nature of a compromise which, when accepted by the company and complied with to the extent of paying all arrearages due under the Act of 1883, operated as an implied release from any other taxes assessed for any period which the gross-earnings tax covered. Nevertheless Mr. Justice Peckham

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[38] 168 U. S. 651, 18 Sup. Ct. Rep. 242 (1898).

[39] Mr. Justice Peckham said that the language of the Act of 1883 "gives great reason to doubt the correctness of the construction which would levy the tax upon the earnings derived from interstate commerce" (168 U. S. 651, 670). The doubt did not have to be resolved, since the company had paid all that had been assessed against it, and could not be in a worse position in recovering its lands because of the chance that it might have paid more than the legislature had intended to exact. The construction of Mr. Justice Peckham is strained and is inconsistent with the declaration in the Act of 1889 which reads: "Any company which has not complied with the provisions of chapter 99 of the Session Laws of 1883 by paying all taxes claimed on gross earnings, both territorial and interstate, or by filing an account of gross earnings, both territorial and interstate, shall prepare and file such account in the manner therein provided . . . and pay one half of the entire amount due. . . ." 168 U. S. 651, 656, 18 Sup. Ct. Rep. 242 (1898).

intimated rather strongly that the court thought the tax constitutional. This he did by way of distinguishing it from those declared invalid in *Fargo* v. *Michigan*[40] and *Philadelphia & Southern Mail S. S. Co.* v. *Pennsylvania*.[41] His comment is as follows:

"In those cases there was a distinct tax upon the gross earnings without reference to any other tax, and not in substitution or in lieu of another tax, while in this case the act plainly substitutes a different method of taxation upon the property of the railroad company. It is a tax upon the lands and all the other property of the company, but instead of placing a valuation upon the lands and other property, and apportioning a certain amount upon such valuation directly, as was the old method, a new one is established of taking a percentage upon the gross earnings as a fair substitute for the former taxes upon all the lands and property of the company, and when it is said, as it is in this act, that the tax collected by this method shall be in lieu of all other taxes whatever, it would seem that it might be claimed with great plausibility that a tax levied under such circumstances and by such methods was not in reality a tax upon the gross earnings, but was a tax upon the lands and other property of the company, and that the method adopted of arriving at the sum which the company should pay as taxes upon its property was by taking a percentage of its gross earnings."[42]

A gross-earnings tax, then, is a property tax, if it is imposed in lieu of a property tax. This sounds somewhat like saying that what is exempted is taxed, and what is taxed is not taxed. By a little logodædaly, things are not what they seem to be. Since taxes on property measured by receipts are valid, and taxes on receipts are not valid, taxes on receipts in lieu of taxes on property must be called taxes on property in order to sustain them. North Dakota had given to the pertinent section of the law of 1883 the heading: "*Percentages of gross earnings to be paid in lieu of other taxes.*"[43] The Act of 1889, in referring to taxes "due under the assessments under said law of 1883," had called them "taxes on both territorial and interstate earnings."[44] But the Supreme Court did not see its way clear to accept the designation and to declare that taxes on receipts from interstate commerce are not regulations of that com-

[40] Note 19, *supra*.
[41] Note 19, *supra*.
[42] 168 U. S. 651, 671, 18 Sup. Ct. Rep. 242 (1898).
[43] *Ibid.*, 654.
[44] Note 39, *supra*.

merce, provided there is no exemption of intra-state receipts and provided further that the tax is in substitution for and not in addition to other taxes. This would have been a more direct and realistic solution of the issue. It is of course but another way of stating the solution actually reached. Whichever way the doctrine is stated, there still remains the question whether a gross-receipts tax, where there is no property to exempt, would be constitutional provided it can be called something else than a tax on receipts from interstate commerce "as such." *Ficklen* v. *Shelby County Taxing District*[45] may be thought to answer the question in the affirmative, provided the gross-earnings tax may be called a tax on a local "occupation." But the tax sustained in that case, though not in lieu of a property tax, was in default of one. We shall consider later whether this makes a difference.

Though the Dakota cases did not definitely pass on the constitutional question, its final settlement was not long delayed. Wisconsin imposed a gross-receipts tax in lieu of other taxes on railroads and its demand was sustained in *Wisconsin & M. Ry. Co.* v. *Powers*,[46] decided in 1903. The opinion of the court by Mr. Justice Holmes was devoted almost entirely to denying the contention that the tax violated contract rights of the complainant. The commerce question was given this terse answer:

> "We need say but a word in answer to the suggestion that the tax is an unconstitutional interference with interstate commerce. In form the tax is a tax on 'the property and business of such railroad corporation operated within the State,' computed upon certain percentages of gross income. The *prima facie* measure of the plaintiff's gross income is substantially that which was approved in *Maine* v. *Grand Trunk Railway Co.*, 142 U. S. 217, 228. See also *Western Union Telegraph Co.* v. *Taggart*, 163 U. S. 1."[47]

The Taggart case was one sustaining a tax measured by the value of total capital stock. The Maine case proceeded on a theory of absolute power over privileges enjoyed by foreign corporations. Neither case is so direct an authority in support of the Wisconsin tax as is the decision in the Ficklen case and the strong *dictum* in *McHenry* v. *Alford*.[48]

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[45] Note 23, *supra*.

[46] 191 U. S. 379, 24 Sup. Ct. Rep. 107 (1903).

[47] *Ibid.*, 387–88.

[48] Note 42, *supra*.

Reference has already been made[49] to the difference of opinion among the judges as to the Texas gross-receipts tax on railroads that came before the court in *Galveston, H. & S. A. Ry. Co.* v. *Texas*[50] in 1907. The tax was imposed on all railroads whose lines lay wholly within the state, and the amount demanded by the law was a sum "equal to one per cent of their gross receipts." This included receipts from interstate commerce, since roads whose termini were both within the state nevertheless carried passengers and goods destined for extra-state points over connecting lines. Mr. Justice Harlan for the minority took a position which is in substance in flat contradiction to the one he elaborated in his solitary dissent in the Ficklen case. In seeking to distinguish the Pennsylvania gross-receipts tax declared unconstitutional in *Philadelphia & Southern Mail S. S. Co.* v. *Pennsylvania*[51] from the Texas gross-receipts tax before the court, he says:

"Here there is no levying upon receipts as such from interstate commerce. The State only measures the occupation tax by looking at the entire amount of the business done within its limits without reference to the source from which the business comes. It does not tax any part of the business because of its being interstate. It has reference equally to all kinds of business done by the corporation in the State. Suppose the State as, under its Constitution it might do, should impose an income tax upon railroad corporations of its own creation, doing business within the State, equal to a given per cent of all income received by the corporation from its business, would the corporation be entitled to have excluded from computation such of its income as was derived from interstate commerce? Such would be its right under the principles announced in the present case. In the case supposed the income tax would, under the principles or rules now announced, be regarded as a direct burden upon interstate commerce. I cannot assent to this view."[52]

The learned dissentient cites no authority for his contention. He argues that the operation of the tax "on interstate commerce is only incidental, not direct,"[53] and points out that the state constitution authorizes the imposition of occupation taxes on corporations and natural persons, and that "the plaintiff in error is a Texas

[49] 31 Harv. L. Rev. 583.

[50] 210 U. S. 217, 28 Sup. Ct. Rep. 638 (1908).

[51] Note 19, *supra*.

[52] 210 U. S. 217, 229, 28 Sup. Ct. Rep. 638 (1908).

[53] *Ibid.*, 229.

corporation."[54] Then follows the indisputable assertion that "it cannot be doubted that the State may impose an occupation tax on one of its own corporations, provided such tax does not interfere with the exercise of some power belonging to the United States." The absence of such interference is predicated on the analysis that the receipts were not taxed as such, but were merely the measure of the tax.

With Mr. Justice Harlan agreed Chief Justice Fuller and Justices White and McKenna.[55] The majority, who held the tax unconstitutional, consisted of Mr. Justice Holmes, who wrote the opinion, and Justices Brewer, Peckham, Day and Moody. At first glance this seems a strange alignment, for Mr. Justice Brewer had been foremost in sustaining property taxes measured more or less by income in part from interstate commerce; and Justices Harlan and White had most strenuously opposed such a measure. Occupation taxes measured by gross receipts seem to bear much more directly on interstate commerce than does a property tax which merely takes account of the value contributed by net earnings. The mystery may be thought to deepen when we compare the division in the Galveston case with that in the Western Union case[56] decided two years later. Here Justices Harlan and White return to their stand against allowing a state to do indirectly what it is forbidden to do directly. Justices Brewer, Day and Moody join them, although in the Galveston case they were in the opposite camp. Justices Holmes and Peckham favor an excise tax measured by total capital stock, but oppose an occupation tax measured by gross receipts. Only Chief Justice Fuller and Mr. Justice McKenna seem to be consistent throughout. They supported the state taxes in all the cases in which they sat.

A closer analysis may resolve some of the perplexity. The opposition of Justices Harlan and White to Ohio's application of the unit rule to express companies and to the Kansas tax on total capital stock is based largely on the conviction that in each case the state was reaching after values not attributable to business or property within its borders.[57] This opposition is not inconsistent

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[54] 210 U. S. 228, 28 Sup. Ct. Rep. 638 (1908).

[55] *Ibid.*, 228–29.

[56] Note 21, *supra*.

[57] See 32 Harv. L. Rev. 254. Chief Justice Fuller and Justices Brewer and Day dissented in Fargo *v.* Hart, 193 U. S. 490, 24 Sup. Ct. Rep. 498 (1904), which upset an

with approval of the Texas tax on gross receipts from business within the state, where the evil of extraterritoriality is absent. Justices Holmes and Peckham based their approval of the Kansas tax on the theory of the absolute and unlimited power of a state over the local business of a foreign corporation,[58] which precludes inquiry into the effect on interstate commerce of an exercise of that absolute power. They are at liberty to question the Texas tax, since it does not purport to be an excise tax on a privilege completely within the power of the state.

The remaining apparent shifts of opinion demand further explanation. It may be frankly recognized that the only conceivable consistency between Mr. Justice Harlan's disapproval of the Maine excise tax and the Shelby County occupation tax, both of which were measured by gross receipts, and his approval of the Texas occupation tax, similarly measured, is the consistency of dissent. Since Mr. Justice Brewer opposed him in all three cases, these two jurists may appear to be exemplars of the famous political leader who was said to have caught his opponents in bathing and run off with their clothes. We hasten to add that the parallel is at most an intellectual, and not a moral, one; for such change of habiliments as was effected by the wearers of the ermine was not a theft but a swap which appears to have given mutual satisfaction. Mr. Justice Brewer's approval of the Maine excise on gross receipts and his disapproval of the Texas occupation tax on such receipts may be reconciled on the ground that the former had the ostensible justification of a tax on a privilege within complete state control. But this justification the learned justice withheld from the Kansas excise on total capital stock, so that he invites us to seek further for his line of thought. This quest leads us to the arguments of counsel against the Texas occupation tax and to the acceptance of those arguments in the majority opinion in the Galveston case.

Counsel for the railroad apparently make no effort to distinguish the Ficklen case from that before the court. This case is naturally relied on by the state, but it is not mentioned in the available abstract of the brief for the road. To the Maine case, however,

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application of the unit rule on the ground that the total capital stock taken as a base included the value of a large amount of personal property in other states not used in the express business and therefore not contributing to any values located in the state. See 31 HARV. L. REV. 772.

[58] See *Ibid.*, 585–88.

Messrs. Garwood and Everts devote considerable attention. They insist that the excise there sustained was like that considered in *Postal Telegraph Cable Co.* v. *Adams*[59] and *McHenry* v. *Alford;*[60]

"that is to say, it was what this court calls a commutation tax levied in lieu of all other taxes; and therefore, in its essential nature, a property tax, or a means resorted to by the state for ascertaining the entire value of the property situated in the state and not otherwise taxed."[61]

As distinguished from such a tax,

"in the case at bar the state has already assessed and equalized for purposes of taxation the properties of the plaintiff in error, and at the time of the levy of this tax, and for long years prior thereto, they had paid taxes, and were paying taxes, to the state upon the full value thus ascertained."[62]

Counsel later seek to restrict the Maine case on grounds which apply also to the Ficklen case, though that inconvenient decision is not mentioned. They argue as follows:

"It never was the intention of the justices who concurred in the decision in *Maine* v. *Grand Trunk R. Co.* . . . to hold that a state could levy an occupation tax on a corporation engaged in the transportation of interstate commerce, or could levy a so-called occupation tax on such corporation, and ascertain the amount thereof by a percentage on the gross receipts of the interstate and foreign commerce; but in fact the tax was there sustained as a property or commutation tax in lieu of all other taxation."[63]

It is clear that the Maine case did not sanction an occupation tax where the element of an exercise of arbitrary power over the enjoyment of corporate privileges was lacking or not relied on. But the Ficklen case appeared to do exactly this. In the Ficklen case, the opinion was flavored slightly with the thought that the tax was sort of a substitute for a property tax; but in the Maine case the

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[59] Note 2, *supra*. In February, 1904, Professor Joseph H. Beale, in criticising the ground on which the Maine case was placed by the court, suggested that a "more tenable ground . . . will probably be found in the later case of Postal Telegraph Cable Co. *v.* Adams." See his article on "The Taxation of Foreign Corporations," 17 *Harv. L. Rev.* 248, 263.

[60] Note 38, *supra*.

[61] 52 L. Ed. 1032.

[62] *Ibid.*

[63] *Ibid.*, 1033. These excerpts from the briefs are not contained in the abstract printed in the official edition of the reports.

point was not mentioned by either the majority or the minority. When we turn, however, to the Maine statute, as printed in the margin of the report of the decision,[64] we find that counsel have correctly analyzed the nature of the tax imposed. From this it appears that all buildings of the road and all land and fixtures outside of its located right of way were taxed locally, and that this tax and the excise measured by gross receipts were "in lieu of all taxes upon such railroad, its property and stock." [65] The gross-receipts tax was the only one levied on account of the rolling stock, the land, ties and rails on the right of way, the capital or intangible property of the company and the economic interests of the shareholders. From the amount thus received by the state, each town in which stock of the road was held was to receive an amount equal to one per cent on the par value of such stock.

This view of the Maine case presented by counsel is accepted by the majority of the court. Mr. Justice Holmes concedes that the case "seems at first sight like a reaction from the Philadelphia and Southern Mail Steamship Company case."[66] He adds not over-confidently: "But it may not have been." [67] Then he proceeds to reinterpret it:

"The estimated gross receipts per mile may be said to have been made a measure of the value of the property per mile. That the effort of the State was to reach that value, and not to fasten on the receipts from transportation as such was shown by the fact that the scheme of the statute was to establish a system. The buildings of the railroad and its lands and fixtures outside of its right of way were to be taxed locally, as other property was taxed, and this excise with the local taxes were to be in lieu of all taxes. The language shows that the local tax was not expected to include the additional value gained by the property being part of a going concern. That idea came in later. The excise was an attempt to reach that additional value. The two taxes together may fairly be called a commutation tax." [68]

Then follow references to *Postal Telegraph Cable Co.* v. *Adams* [69] which sustained a privilege tax, assessed at $1 per mile with a

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[64] 142 U. S. 217, 218, 12 Sup. Ct. Rep. 121 (1891).

[65] *Ibid.*

[66] 210 U. S. 217, 226, 28 Sup. Ct. Rep. 638 (1908).

[67] *Ibid.*

[68] *Ibid.*

[69] 155 U. S. 688, 15 Sup. Ct. Rep. 268 (1895). See 32 Harv. L. Rev. 249.

maximum of $3,000, in lieu of other taxes, as in substance a property tax; to the passage in *McHenry* v. *Alford*[70] which is quoted on page 382, *supra;* and to a portion of the majority opinion in the Ficklen case which said that in the Maine case

"it was held that the reference by the statute to the transportation receipts and to a certain percentage of the same, in determining the amount of the excise tax, was simply to ascertain the value of the business done by the corporation, and thus to obtain a guide to a reasonable conclusion as to the amount of the excise tax which should be levied." [71]

Attention should be called to the fact that Mr. Justice Holmes did not refer to the page in the opinion in the Ficklen case which suggested that the occupation tax might be regarded as a substitute for a property tax.[72] As has already been pointed out, the tax imposed on Mr. Ficklen was rather in default of a property tax than in lieu of one, since he had no property devoted to his occupation and so escaped nothing else by paying the tax on gross receipts. The only distinction in this respect between the Ficklen case and the Galveston case is that the railroad did have property in Texas used in its occupation and that this property was taxed.[73] On this ground the two cases may be distinguished, so that it cannot be said that the latter overrules the former; nor does the opinion in the latter attempt to reinterpret the former. The present health of the Ficklen case will be diagnosed later.[74] If it is not yet moribund, the scope for gross-receipts taxes is somewhat wider than that plotted in Mr. Justice Holmes' reinterpretation of the Maine case. We shall inquire later whether, in order to impose a gross-receipts tax, there must be some other recognized subject of state taxation which is exempted from other burdens than the payment

[70] Note 38, *supra*.

[71] 145 U. S. 1, 23, 12 Sup. Ct. Rep. 810 (1892), referred to, but not quoted, in 210 U. S. 217, 226, 28 Sup. Ct. Rep. 638 (1908).

[72] 145 U. S. 1, 24, 12 Sup. Ct. Rep. 810 (1892). This passage is quoted on page 379, *supra*.

[73] Another distinction which is possibly material in other connections is that the Shelby County tax was only on those who desired to do a "general business," while the Texas tax was on all railroads whose lines lay wholly within the state. The Texas tax would fall by its terms on such a corporation which confined itself to interstate commerce. As a practical matter, however, this distinction is negligible, since no railroad whose lines lay wholly within the state would confine itself to interstate commerce.

[74] See pages 409-16, *infra*.

of a percentage of gross-receipts, or whether it is sufficient that the gross-receipts tax is not a drain on any economic interest that is making other contributions to the state treasury, *i.e.*, whether a gross receipts tax in default of other taxes is as good as one in lieu of them.[75]

Another question that presents itself is whether a gross-receipts tax must be in lieu of all taxation on tangible property or some part thereof, or whether it is saved from sin if the valuation of the tangible property does not include its value as part of a "going concern," that is, does not include the contribution of the business in which the property is employed. The Galveston case does not answer this question. In the Maine case the road-bed and rolling stock contributed nothing to the state except the excise on gross receipts. In the Galveston case, no property of the road went unassessed because of the gross-receipts tax. But it was not because no property went unassessed that Mr. Justice Holmes distinguished the Texas tax from that of Maine. It was because "another tax on the property of the railroad is upon a valuation of that property, *taken as a going concern*." [76] The value of the business had already been reached by the subjection of the company's franchise to an *ad valorem* tax as property. This value of the business is what the Supreme Court calls the "intangible property." Texas took toll from this intangible property by a tax on the valuation of the franchise and by the gross-receipts tax as well. Plainly a

[75] See pages 414-16, *infra*.

[76] 210 U. S. 217, 228, 28 Sup. Ct. Rep. 638 (1908). Italics are writer's. In the opinion, this passage is not preceded by "because," but by the statement: "On the contrary, we rather infer from the judgment of the state court and from the argument on behalf of the state that," etc. In the opinion of the state court, Judge Brown, in distinguishing some earlier Texas decisions, said: "The fact that the franchise is subjected in this state to an *ad valorem* tax as property does not militate against the right to tax the persons or the corporations using that property as an occupation any more than would the taxing of the physical property of the railroads, as the tracks, right of ways, cars, etc., operate to prevent the imposition of occupation taxes for the use of them as instruments of transportation. There is nothing in the case cited which intimates a prohibition against levying an occupation tax upon the company which may use the franchises taxed as property. As well might it be held that an *ad valorem* tax upon a storehouse, fixtures, and goods would preclude an occupation tax upon the merchant for pursuing the business of selling goods." State *v.* Galveston, H. & S. A. Ry. Co., 100 Texas, 153, 172, 97 S. W. 71 (1906). The Texas court sustained the tax on the authority of the Maine case and of the Home Insurance case on which the Maine case had been based. The later legislation and judicial decision in Texas are referred to in 31 HARV. L. REV. 762, note 156.

different question would have been presented had the gross-receipts tax been the only effort to draw sustenance from the "intangible property," even though all tangible property was subjected to *ad valorem* assessments.

Henderson Bridge Co. v. *Kentucky*,[77] decided in 1897, appears to be a case in which a tax on the "intangible property" of an interstate bridge company was assessed by capitalizing the gross receipts and then deducting the value of the tangible property. The majority did not notice the fact that gross, rather than net, receipts were used. Chief Justice Fuller contented himself with saying that the authorities cited in the Ohio Express cases sanctioned the method of taxation prescribed by the Kentucky statute, and that the tax was not on the interstate business carried on over the bridge, because the company did not carry on that business but merely received tolls from its lessee, thus bringing the case within *Erie Railroad* v. *Pennsylvania*.[78]

The Erie case seemed to go on the ground that tolls received for rental were not receipts from interstate commerce although the lessee paying the tolls was engaged in interstate commerce, thus treating rent from a leased railroad like rent from a leased office building. The statute, as paraphrased in the opinion of Mr. Justice Shiras, imposed "a tax of eight-tenths of one per centum upon the gross receipts of said company for *tolls and transportation*."[79] No reference is made in the statement of facts or in the opinion to any other features of the state taxing system. Mr. Justice Shiras recognizes that receipts from interstate commerce cannot be taxed directly, but says that "the tax complained of is not laid on the transportation of the subjects of interstate commerce, or on the receipts derived therefrom, or on the occupation or business of carrying it on."[80] The only hint that the tax was one in lieu of a property tax is contained in the succeeding sentence which says: "It is a tax upon the corporation on account of its property in a railroad, and which tax is measured by a reference to the tolls received."[81]

In the Galveston case Mr. Justice Holmes refers to this passage

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[77] Note 7, *supra*.

[78] Note 6, *supra*.

[79] 158 U. S. 431, 435, 15 Sup. Ct. Rep. 896 (1895).

[80] *Ibid.*, 438.

[81] *Ibid.*, 439.

without quoting it, seeming to imply thereby that the tax in the Erie case was in lieu of others. No reference is made to the Henderson Bridge case. This case and the Erie case can both be rested on the doctrine that receipts from rent are not receipts from interstate commerce.[82] In the Henderson Bridge case the receipts were not the direct measure of the tax on intangible property; they were merely used by the assessors as a guide in fixing the value of that property. Plainly, therefore, neither of these cases can be securely relied on to support the contention that a gross-receipts tax is a good substitute for an assessment of the intangible property of the taxpayer, even though no tangible property has been relieved from the ordinary *ad valorem* tax. But such a contention is not foreclosed by either of these cases or by the Galveston case. The possible distinction between taxes on gross and on net receipts will be considered later in connection with the cases dealing with the net income taxes of Wisconsin and of the federal government.[83]

Those who before 1908, when the Galveston case was decided, had struggled in vain to reconcile the decisions on the subject under consideration may still remember vividly the relief afforded by Mr. Justice Holmes' opinion in that case. It would perhaps be too much to say that he straightens out the tangle; but at any rate he tells us what methods will hinder and what will help in accomplishing the task. He makes it clear that no mechanical logic can minister to our needs. He frees us from the tyranny of terms. He exposes the assumption that there is any magic in words. He tells us that "regulation" is a word of art, which the court uses, not for all that regulates, but only for that which regulates too much or in some disapproved way.

"It being once admitted, as of course it must be, that not every law that affects commerce, among the States is a regulation of it in a constitutional sense, nice distinctions are to be expected. Regulation and commerce among the States both are practical rather than technical conceptions, and, naturally, their limits must be fixed by practical lines." [84]

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[82] This doctrine appears to be now abandoned, at least with respect to rental for the use of cars which journey in interstate commerce. See the sentence from Mr. Justice Van Devanter quoted on page 402, *infra*.

[83] See pages 415-16, *infra*.

[84] 210 U. S. 217, 225, 28 Sup. Ct. Rep. 638 (1908).

The absence of a sharp antithesis between the taxes that have been approved and those that have been condemned is frankly recognized:

"As the property of companies engaged in such commerce may be taxed . . . , and may be taxed at its value as it is in its organic relations, and not merely as a congeries of unrelated items, taxes on such property have been sustained that took account of the augmentation of value from the commerce in which it was engaged. . . . Since the commercial value of property consists in the expectation of income from it, and since taxes ultimately, at least in the long run, come out of income, obviously taxes called taxes on property and those called taxes on income or receipts tend to run into each other somewhat as fair value and anticipated profits run into each other in the law of damages. The difficulty of distinguishing them became greater when it was decided, not without much debate and difference of opinion, that interstate carriers' property might be taxed as a going concern."[85]

Then follows the reinterpretation of the Maine case and a quotation from *Postal Telegraph Cable Co.* v. *Adams*:[86]

"By whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution."[87]

The question before the court is said to be "whether this is such a tax."[88] Mr. Justice Holmes paves the way for an answer by the following recapitulation and analysis:

"It appears sufficiently, perhaps from what has been said, that we are to look for a practical rather than a logical or philosophical distinction. The State must be allowed to tax the property and to tax it at its actual value as a going concern. On the other hand the State cannot tax the interstate business. The two necessities hardly admit of an absolute logical reconciliation. Yet the distinction is not without sense. When a

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[85] 210 U. S. 225–26, 28 Sup. Ct. Rep. 638 (1908).

[86] Note 69, *supra*.

[87] 155 U. S. 688, 697, 15 Sup. Ct. Rep. 268 (1895); quoted in 210 U. S. 217, 227, 28 Sup. Ct. Rep. 638 (1908). This same passage from the opinion in the Postal Telegraph case, together with what immediately precedes it, is quoted by Mr. Justice Day in United States Express Co. *v.* Minnesota, 223 U. S. 335, 347–48, 32 Sup. Ct. Rep. 211 (1912). See page 402, *infra*.

[88] 210 U. S. 217, 227, 28 Sup. Ct. Rep. 638 (1908).

legislature is trying simply to value property, it is less likely to attempt to or effect injurious regulation than when it is aiming directly at the receipts from interstate commerce. A practical line can be drawn by taking the whole scheme of taxation into account. That must be done by this court as best it can. Neither the state courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect. If it bears upon commerce among the States so directly as to amount to a regulation in a relatively immediate way, it will not be saved by name or form." [89]

These canons were not difficult to apply to the Texas tax before the court. The value of the property as a going concern had already been reached by other taxes. To the argument of counsel for the state that "'equal' implies, not identity, but duality," [90] Mr. Justice Holmes replied:

"The distinction between a tax 'equal to' one per cent of gross receipts and a tax of one per cent of the same, seems to us nothing, except where the former phrase is the index of an actual attempt to reach the property and to let the interstate traffic and the receipts from it alone. We find no such attempt or anything to qualify the plain inference from the statute taken by itself." [91]

The tax in question was said to be "merely an effort to reach the gross receipts, not even disguised by the name of an occupation tax, and in no way helped by the words 'equal to.'" [92] It was added that "of course, it does not matter that the plaintiffs in error are domestic corporations or that the tax embraces indiscriminately gross receipts from commerce within as well as outside of the State." [93]

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[89] 210 U. S. 227, 28 Sup. Ct. Rep. 638 (1908).

[90] *Ibid.*, 223.

[91] *Ibid.*, 227.

[92] *Ibid.*, 228.

[93] *Ibid.*, 228. Mr. Justice Harlan, on behalf of the minority, implied that it did matter that the corporation was a domestic one, for he says: "The plaintiff in error is a Texas corporation, and it cannot be doubted that the State may impose an occupation tax on one of its own corporations, provided such tax does not interfere with the exercise of some power belonging to the United States" (*Ibid.*, 229–30). The proviso of course weakens the statement in logic, if not in judicial psychology; but later on page 229 in the passage quoted on page 385, *supra*, the dissenting opinion invokes the supposition that the state might impose on railroad corporations "of its own creation" an income tax, thus again implying that the domesticity of the corporation was a material element in the case.

It will be remembered that one of the grounds on which State Tax on Railway

The tax, then, was on the interstate business and not on the property at its value as a going concern. When we seek for the reason why this tax was not on the property as a going concern, we find that it is because there was another tax on the property as a going concern. The reason is not completely satisfying. Disregarding words and looking to substance, we do not readily perceive why one tax as well as the other cannot be on the property as a going concern, nor why one as well as the other is not on the business. There is ample reason why the legitimacy of one may depend on the presence or absence of the other, and there is no just ground for complaint because the court picked for slaughter the one that was before it. Since the state should not have both, but either would be allowable if alone, the designation of the good and the bad is wisely determined in accordance with the formal line of demarcation which the court had previously established. Mr. Justice Holmes correctly states the traditional theory that the state can tax the property at its value as a going concern, but cannot tax

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Gross Receipts, 15 Wall. (U. S.) 284 (1872), proceeded was that the corporation was a domestic one, and that this ground of the decision was not overruled in the Philadelphia Steamship case, note 19, *supra*. In 1875, Railroad Co. *v.* Maryland, 21 Wall. (U. S.) 456 (1874), considered in 31 HARV. L. REV. 578–79, sustained a charter provision requiring an interstate railroad corporation to pay to the chartering state semi-annually one-fifth of its total gross passenger receipts. Ashley *v.* Ryan, 153 U. S. 436, 14 Sup. Ct. Rep. 865 (1894), 31 HARV. L. REV. 580–81, and Kansas City, M. & B. R. R. Co. *v.* Stiles, 242 U. S. 111, 37 Sup. Ct. Rep. 58 (1916), 31 HARV. L. REV. 599–600, sustained charter provisions requiring a charter fee or an annual excise measured by total capital stock. The idea in these cases seemed to be that a state can put any price it pleases on the grant of a charter to be a corporation. International & G. N. Ry. Co. *v.* Anderson County, 246 U. S. 424, 38 Sup. Ct. Rep. 370 (1918), however, implies that provisions of a police character in corporate charters may by reason of changed conditions become invalid regulations of interstate commerce.

These cases, however, do not bear on the question involved in the Galveston case, because the tax there in issue was not a franchise tax, nor was it, so far as appears, on the statute book when the complainant was incorporated. The franchise was taxed as property under another statute. Though Texas had avoided naming the "subject" it had selected for taxation, it had by selecting certain kinds of corporations engaged in a certain kind of occupation, imposed an occupation tax. The state court had called it an occupation tax, and had strongly implied, if not specifically declared, in a passage in the opinion immediately preceding that quoted in note 76, *supra*, that this construction was necessary in order to sustain the tax under the state constitution. The exaction, therefore, had to stand or fall as an occupation tax, quite independently of any peculiar power of a state over its own corporate creatures. The Philadelphia Steamship case, note 19, *supra*, at pages 342–43, shows that where a state seeks to justify its exaction as one on the franchise of domestic corporations, it must clearly indicate that this is the power and the only power that it is exercising.

the interstate business. The gross-receipts tax before the court did not profess to be a property tax, whereas by another statute the franchise was subjected to an *ad valorem* tax as property.[94] The state itself had chosen to call one a property tax and the other something else. It can hardly complain that the court accepts its designations in choosing which one to reject, and decides that it is less likely to effect injurious regulation of interstate commerce by the tax which it calls a property tax than by the one which is more directly on interstate receipts.

This traditional theory, as Mr. Justice Holmes announces, posits two necessities that do not admit of logical reconciliation. This is because a tax on the value of the property as a going concern is a tax on the value of the going concern, and the value of the going concern is the value of the business. It would make for simplicity and directness to recognize that a tax on the value of the business is a tax on the business. The business may be worth more or less than the reconstruction cost of the property less depreciation. Where the property has no alternative uses, its value, whatever its cost, cannot exceed the value of the business which it serves. In the case of that part of the property of a railroad which is permanently and inseparably devoted to the business, it would be difficult if not impossible to find its value except through the value of the business. But this does not apply to migratory cars or to the wagons, horses and pouches owned by the express companies in Ohio. With respect to such property it is readily apparent that a tax on the value of the property as a going concern is a tax on the business. This conclusion is fortified rather than disguised by resort to the notion that what the state is taxing is "intangible property." Intangible property has a familiar connotation which is quite distinct from the enjoyment or anticipation of business profits.

The logical nebule which the opinions have exhaled by insisting that taxes on business were taxes on something else was by no means inevitable. It must be dispelled before we can see clearly. It is a legal doctrine that a state cannot tax interstate business, but it is not on economic fact. We might have been saved from wearisome confusion if the court had long ago declared that under some circumstances and by some methods a state may tax interstate business,

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[94] See note 76, *supra*.

and that under other circumstances and by other methods it may not. Such a declaration would have turned attention more directly to the circumstances and to the methods. The rules of law might then have been worked out on matter-of-fact lines which avoided logical inconsistency by avoiding fictions and the semblance of generality when the generality was shadow and not substance.

We have already considered the reasons why it is as wise and necessary to allow the states to tax interstate commerce as to allow them to tax property employed in interstate commerce.[95] Exemption of such commerce from burdens which local commerce must bear would be equivalent to a bounty on interstate commerce. The withholding of such a bounty from interstate commerce ought not in wisdom to be regarded as "a regulation of it in a constitutional sense." But the court must be zealous to restrain the states from obtaining revenue from extraterritorial sources or from imposing cumulative exactions on interstate business without similarly burdening all local business. Owing to the ubiquity of property taxation and to the fact that the value of real estate and of stocks and bonds and similar obligations bears a close relation to the income from such property, a state "is less likely to attempt to or effect injurious regulation," when it "is trying simply to value property" than "when it is aiming directly at the receipts from interstate commerce." [96] On the other hand, the states have been more sporadic and selective in their impositions on occupations and on income. They must therefore be held to strict account when they tax income from interstate commerce. They must establish that the burden is a general and not a discriminatory one.

The court is satisfied when the state shows that the income is taken as a fair measure of the value of property assessed for taxation, or when a tax on income is in substitution for a tax on property. It was satisfied in the Ficklen case when gross receipts were taxed in the absence of taxation on property because there was no property to tax. It has been satisfied more recently with a state-wide income tax measured by net rather than gross receipts.[97] In the presence of

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[95] 32 HARV. L. REV. 260-62.

[96] From Mr. Justice Holmes' opinion in the Galveston case, quoted on page 394, *supra*.

[97] United States Glue Co. *v.* Oak Creek, 247 U. S. 321, 38 Sup. Ct. Rep. 499 (1918). See pages 415-16, *infra*.

these safeguards against discrimination, taxes substantially on interstate business have been sustained. Thus the state may aim directly at gross or net receipts from interstate commerce, if it restrains itself from other shots at the same economic interest, or at net receipts if it aims equally at all receipts from all sources within the state. The law may be stated in this way with little or no fiction, word-juggling or logical inconsistency. Such a mode of statement has the further advantage that it throws the spotlight on the "practical lines" by which the limits of the practical conception of regulation are fixed, and which divide all factual regulations of interstate commerce into those that are, and those that are not, regulations of that commerce "in a constitutional sense."

The distinction set forth in the Galveston case and retroactively applied to the earlier cases acquits Mr. Justice Brewer of the charge of inconsistency. The gross-receipts tax of which he disapproved was in addition to another tax on the same business value; those which he favored were not. This distinction is the basis of the difference between the decisions in *Meyer* v. *Wells, Fargo & Co.*[98] and *United States Express Co.* v. *Minnesota*,[99] both of which were rendered on February 19, 1912. Both involved gross-receipts taxes on nonresident express companies. The Texas tax held invalid in the Meyer case was declared by the statute to be "in addition to the taxes levied and collected upon an *ad valorem* basis upon the property and assets of such corporation." [100] The Minnesota tax held rightfully exacted from the United States Express Company was "in lieu of all taxes upon its property." [101] Both decisions were unanimous.

The greater part of the receipts taxed by Minnesota were held not to be from interstate commerce. These were from carriage between points within the state over a route which passed through a portion of another state. The state court had subtracted that portion of these receipts which the carriage in the intervening state bore to the total carriage. Whether such deduction was necessary the Supreme Court was not called upon to say. It sustained the balance on the authority of *Lehigh Valley R. R. Co.* v. *Pennsyl-*

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[98] 223 U. S. 298, 32 Sup. Ct. Rep. 218 (1912).
[99] 223 U. S. 335, 32 Sup. Ct. Rep. 211 (1912).
[100] 223 U. S. 298, 299, 32 Sup. Ct. Rep. 218 (1912).
[101] 223 U. S. 335, 339, 32 Sup. Ct. Rep. 211 (1912).

vania,[102] on which the state court had relied.[103] In the Lehigh case, Pennsylvania had confined itself to the receipts from that part of the transportation which took place within its borders, so that the decision does not affirm that it could not have used the receipts from the entire journey.[104] Chief Justice Fuller stated that the

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[102] 145 U. S. 192, 12 Sup. Ct. Rep. 806 (1892).

[103] State *v.* United States Express Co., 114 Minn. 346, 349–50, 131 N. W. 489 (1911). Of the Lehigh case, Judge Bunn observed: "It perhaps does not appear as clearly as it might whether the recovery in that case was allowed for the entire earnings, or for a proportion thereof based upon the mileage within the state; but we interpret the decision as allowing a recovery of taxes upon that proportion of the earnings derived from the carriage wholly within the state. This seems to us the safer rule, and avoids any question of taxing interstate commerce, and we adopt and apply it to this case. Nine per cent of the taxes recovered on this class of earnings should be deducted from the amount of the recovery" (page 350).

Judge Bunn is warranted in finding the Lehigh case somewhat deficient in clarity. From the statement of facts it appears that the auditor-general of the state had "settled an account" with the company for its taxes on gross receipts, which account included, in addition to receipts from carriage entirely within the state and from carriage between two termini within the state passing en route through another state, five other classes of receipts all of which were from interstate commerce, with the possible exception of class three which was made up of receipts from "transportation by continuous carriage from points in a foreign state to other points in the same state passing through the state of Pennsylvania." The other receipts taken were from interstate commerce originating or ending in Pennsylvania, or passing through Pennsylvania between termini in two other states, or commerce not traversing Pennsylvania at all.

In all instances the total receipts for the entire carriage were taken, and this amount was then reduced to a fraction which corresponded to the fraction of the company's total mileage which lay within the state. The state court relieved the company from any inclusion in the assessment of the last five classes enumerated. So far as appears, the state made no endeavor to amend the account so as to levy on all the receipts in the first two classes. Plainly there was no necessity that it should restrict itself to less than all of the receipts from commerce wholly within the state. Its use of the fraction was part of another plan which the state court frustrated. It is evident, however, it was only the fraction of the receipts from commerce between points in the state passing through the intervening state that came to the Supreme Court, for Chief Justice Fuller states that "the tax under consideration here was determined in respect of receipts for the proportion of the transportation within the State . . ." (145 U. S. 192, 201).

[104] The natural inference from the opinion of Chief Justice Fuller is that the whole trip was an intra-state trip, so far as taxation is concerned, since he answers in the negative the question whether "the mere passage over another State renders that business foreign, which is domestic." Ewing *v.* Leavenworth, 226 U. S. 464, 33 Sup. Ct. Rep. 157 (1913), allowed a state to impose a flat fee on this kind of commerce. In New York *ex rel.* Cornell Steamboat Co. *v.* Sohmer, 235 U. S. 549, 35 Sup. Ct. Rep. 162 (1915), it was held that no deduction from receipts for transportation on the Hudson River between New York points was necessary because the route traversed water within the jurisdiction of New Jersey or because the tows which carried the com-

question "is simply whether, in the carriage of freight and passengers between two points in one State, the mere passage over the soil of another State renders that business foreign, which is domestic,"[105] and he answered that, "we do not think such a view can reasonably be entertained."[106]

The remaining receipts levied on by Minnesota, to which the United States Express Company objected, were from that part of interstate commerce which it carried on within Minnesota, including carriage to or from points within the state and carriage through the state between termini in other states. All this business was received by the complainant at a point within the state, either from the shipper or from connecting carriers in other states, and was delivered within the state either to the consignee or to a connecting carrier. For some reason Minnesota did not claim taxes upon such interstate receipts "where the same express company performs the transportation service both within and without the State."[107] That this self-denial was imposed by benevolence and

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merce were made up in New Jersey. Whether there was any distinction in this respect between transportation over water and that over land was not considered.

In the case of land transportation, the state of termini has been forbidden to regulate the rates of carriage which traverses an intervening state. Hanley *v.* Kansas, etc. Ry., 187 U. S. 617, 23 Sup. Ct. Rep. 214 (1903). The state is also forbidden to direct that a carrier shall ship between two points in the state by a route which is wholly within the state rather than by one which dips into another state. Northern Pacific Ry. Co. *v.* Solum, 247 U. S. 477, 38 Sup. Ct. Rep. 550 (1918). On the other hand, California was allowed to regulate rates for carriage between two points in the state traversing the high seas en route. Wilmington Transportation Co. *v.* Railroad Commission, 236 U. S. 151, 35 Sup. Ct. Rep. 276 (1915). See editorial notes in 27 Harv. L. Rev. 686, and 28 Harv. L. Rev. 634. Here of course there was no intervening state whose jurisdiction was in any way interfered with.

The Cornell Steamboat case, *supra*, if applicable to land transportation, would allow a state to extract revenue from receipts from transit which is not within its own police protection and which is likely to cause expense to its neighbor within whose borders it takes place. In the Lehigh Valley case, Chief Justice Fuller thought it important to say that "it should be remembered that the question does not arise as to the power of any other State than the State of the termini" (page 202). This carries the possible implication that the transit in the intervening state is interstate commerce, so far as its powers of taxation are concerned. Quite aside from the commerce clause, a grave question arises whether a state should tax receipts from extra-territorial transit. The difference between land and water transportation seems sufficient to warrant the restriction of the Cornell Steamboat case to the particular kind of transportation there before the court.

[105] 145 U. S. 192, 202, 12 Sup. Ct. Rep. 806 (1892).

[106] *Ibid.*, 202.

[107] 223 U. S. 335, 341, 32 Sup. Ct. Rep. 211 (1912).

not by the Constitution is evident from *Cudahy Packing Co.* v. *Minnesota*,[108] decided last April, in which the Supreme Court sustained a similar gross-receipts tax imposed by the same state on receipts earned within its borders from refrigerator cars which ran in and out of the state.

The packing company which owned the cars received a "compensation or rental"[109] of one cent a mile from the railroads which transported them, and paid the railroads the usual tariff rates for the transportation of its own products, allowing the roads to carry the products of others on the return trip. Mr. Justice Van Devanter concluded his opinion by saying that, "we think the tax is not distinguishable from that sustained in *United States Express Co.* v. *Minnesota*,"[110] without referring to the fact that in that case "the transportation in connection with such shipments outside of the state of Minnesota was performed by connecting companies other than the defendant."[111] Nor did the opinion refer to the possibility of applying the point made in *Erie Railroad* v. *Pennsylvania*[112] and *Henderson Bridge Co.* v. *Kentucky*[113] that the receipts were from rental of property rather than from interstate carriage. It stated, however, that if the tax "is laid on the earnings as such, they being derived largely from interstate commerce, it is an unconstitutional restraint or burden on such commerce and void,"[114] thus abandoning the doctrine of the earlier cases without noticing that it had done so.

Both of these Minnesota taxes were treated as property taxes measured by gross receipts. It appears, however, that from all "receipts for business done within the State by such company in connection with other companies" the United States Express Company was allowed to deduct "the amounts paid for transportation to railroads within the State."[115] No mention of this concession was made in Mr. Justice Day's opinion. From the Cudahy Packing case it appears that the railroads were allowed to deduct their

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108 246 U. S. 450, 38 Sup. Ct. Rep. 373 (1918).
109 *Ibid.*, 451.
110 *Ibid.*, 456.
111 223 U. S. 335, 341, 32 Sup. Ct. Rep. 211 (1912).
112 Note 6, *supra*.
113 Note 7, *supra*.
114 246 U. S. 450, 453, 38 Sup. Ct. Rep. 373 (1918).
115 223 U. S. 335, 339, 32 Sup. Ct. Rep. 211 (1912).

payments for the use of the cars from their "gross earnings" used as the measure of another tax not before the court. This was referred to as disclosing "a purpose to avoid taxing the same property twice or at more than its value, measured by what it earns." [116] The Cudahy people contended that the cars were taxed twice because the railroad paid on their earnings to them less the one cent a mile paid as rental, but Mr. Justice Van Devanter answered:

"The contention apparently assumes that the receipts from such shipments arise solely from the use of these cars, whereas they arise in part from the use of the tracks, locomotives, fuel, labor and the like provided by the railroads. Not improbably only a minor part is fairly attributable to the use of cars. In any event, the company has an interest in the car line which yields it a rental of one cent for each mile of travel. This interest is taxable and the State values it for that purpose by the rental received." [117]

It is obvious that a gross-receipts tax on selected kinds of property may be used as a device to tax property employed in interstate commerce more heavily than the great bulk of property which is assessed by the *ad valorem* method. Unless some curb is set to the rate of assessment on the gross receipts, a state may easily extract from interstate commerce more than its proportional contribution to the public revenues. The court has appreciated this danger. In the United States Express case Mr. Justice Day quotes from the opinion in *Postal Telegraph Cable Co.* v. *Adams* [118] as follows:

"Doubtless, no State could add to the taxation of property according to the rule of ordinary property taxation, the burden of a license tax on the privilege of using, constructing, or operating an instrumentality of interstate or international commerce, or for the carrying on of such commerce; but the value of property results from the use to which it is put, and varies with the profitableness of that use, and by whatever name the exaction may be called, *if it amounts to no more than the ordinary tax upon property or a just equivalent therefor, ascertained by reference thereto*, it is not open to attack as inconsistent with the Constitution." [119]

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[116] 246 U. S. 450, 456, 38 Sup. Ct. Rep. 373 (1918).

[117] *Ibid.*, 456.

[118] Note 69, *supra*.

[119] 155 U. S. 688, 697–98, 15 Sup. Ct. Rep. 268 (1895); quoted in 223 U. S. 335, 347–48, 32 Sup. Ct. Rep. 211 (1912). Italics are writer's. Another portion of Chief Justice Fuller's opinion in the Postal Telegraph case (not referred to by Mr. Justice

Mr Justice Day then adds:

"We think the tax here in question comes within this principle. There is no suggestion in the present record, as was shown in *Fargo* v. *Hart*, 193 U. S. 490, that the amount of the tax is unduly great, having reference to the real value of the property of the company within the State and the assessment made." [120]

The evil that appeared in *Fargo* v. *Hart* [121] was necessarily absent in the United States Express case, for it consisted of including in the total value of property assessed by the unit rule a large amount of property outside the state not used in the express business and therefore not properly distributable on a mileage basis among the various states in which the express business was carried on. The unit rule was not used in taxing the United States Express Company, since its transportation in question was confined to the limits of the state. The only objection open to the company was that the rate of six per cent on the gross receipts made the tax relatively high as compared with general property taxation. This objection does not appear to have been made.

The point was, however, urged by the Cudahy Packing Company. It appeared that the average number of cars in the state per day ranged from ten to twelve and that "the cash value of each car, as a separate article of tangible property, is from $700 to $900." [122] The contention of the complainant and its dismissal is stated by Mr. Justice Van Devanter as follows:

"Because the usual tax rate if applied to the cash value of the cars taken separately, would result in an appreciably lower tax, it is insisted that the tax imposed is in excess of what would be legitimate as an ordinary tax on the property. But the contention proceeds on an

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Day in the United States Express case) bears on the same point: "But property in a State belonging to a corporation, whether foreign or domestic, engaged in foreign or interstate commerce, may be taxed, or a tax may be imposed on the corporation on account of its property within a State, and may take the form of a tax for the privilege of exercising its franchises within the State, *if the ascertainment of the amount is made dependent in fact on the value of its property situated within the State* (*the exaction, therefore, not being susceptible of exceeding the sum which might be leviable directly thereon*), and if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes." 155 U. S. 688, 696. Italics are writer's.

[120] 223 U. S. 335, 348, 32 Sup. Ct. Rep. 211 (1912).

[121] Note 57, *supra*.

[122] 246 U. S. 450, 452, 38 Sup. Ct. Rep. 373 (1918).

erroneous assumption. The State is not confined to taxing the cars or to taxing them as separate articles. It may tax the entire property, tangible and intangible, constituting the car line as used within its limits and may tax the same at its real value as part of a going concern. The record makes it reasonably certain that the property, valued with reference to its use and what it earns, is worth considerably more than the cash value of the cars taken separately — enough more to indicate that the tax is not in excess of what would be legitimate as an ordinary tax on the property taken at its real or full value." [123]

An interesting variant of the same question is raised in the *Ohio Tax Cases*.[124] Before the decision in the Galveston case, Ohio had a statute under which railroads were required to pay one per cent of their gross earnings from all commerce within the state. After the Galveston decision, the Ohio law was amended so that the gross-receipts tax was limited to intra-state receipts. The rate on railroads however, was increased from one to four per cent. Counsel for the company contended that this increase

"was due to the fact that it was conceived that about three-fourths of their business was interstate, and that therefore a tax of 4% on the intrastate earnings would be about equal to a tax of 1% on the total; in other words, that the tax rate was increased fourfold because such utilities were engaged in interstate commerce." [125]

The argument was that a disproportionate rate on the intra-state receipts of companies whose business was preponderantly interstate was in effect an effort to tax the interstate receipts.

The Ohio tax was not in lieu of a property tax, so that, in view of the general trend of recent decisions, there was strong reason to believe that the court would hold it unconstitutional if, under the guise of levying on receipts from local commerce, it in substance reached those from interstate commerce. The complaint of the companies was like that made unsuccessfully in *Pullman Co.* v. *Adams* [126] and *Allen* v. *Pullman's Palace Car Co.*[127] in which it was urged that a specific tax of $3,000 and a tax of $100 plus twenty-five cents per mile, imposed nominally on intra-state commerce, were in

[123] 246 U. S. 455–56, 38 Sup. Ct. Rep. 373 (1918).
[124] 232 U. S. 576, 34 Sup. Ct. Rep. 372 (1914).
[125] *Ibid.*, 592.
[126] 189 U. S. 420, 23 Sup. Ct. Rep. 494 (1903). See 31 Harv. L. Rev. 582.
[127] 191 U. S. 171, 24 Sup. Ct. Rep. 39 (1903). See 31 Harv. L. Rev. 582–83.

effect on interstate commerce because the local commerce was unremunerative. The contention was rejected on the ground that the companies were free to abandon the intra-state commerce and thus avoid the tax. This ground of decision was later discountenanced in *Western Union Telegraph Co.* v. *Kansas*,[128] and *Looney* v. *Crane Co.*[129] at least in its application to taxes in substance on extraterritorial values. It does not appear that it was open to the companies before the court in the *Ohio Tax Cases*.[130] Presumably they were not, like the Pullman companies in Mississippi and Tennessee, expressly relieved from the common-law duty to serve all, and therefore could not abandon the local commerce unless they withdrew from the business entirely.[131]

It would seem that counsel for the railroads in Ohio raised a point of undoubted merit, provided it was supported by the facts. The rates on other public utilities less likely to be engaged in interstate commerce were less than half of those on railroads and pipe lines. Plainly there was evidence of a process of artificial selection which, if carried far enough, might effectively impose discriminatory burdens on interstate commerce. The court's treatment of the issue thus raised seems somewhat evasive. Mr. Justice Pitney contents himself with saying:

"The present act does not on its face manifest a purpose to interfere with interstate commerce, and we are unable to accept the historical

[128] Note 21, *supra*.

[129] 245 U. S. 178, 38 Sup. Ct. Rep. 85 (1917).

[130] Note 124, *supra*.

[131] For a different view on this point see Northern Pacific Railway Co. *v.* Gifford, 25 Idaho, 196, 136 Pac. 1131 (1913), 31 HARV. L. REV. 737. See also 31 HARV. L. REV. 762, note 156. Even though a carrier might be permitted by a state to abandon a local business that excessive taxation made unprofitable, such economically enforced abandonment ought on the doctrine of the Western Union case and the Looney case (notes 21 and 129, *supra*) to be held an unconstitutional burden on interstate commerce. Those were cases in which a state had measured its tax by extraterritorial values, but the same unpleasant effect on interstate commerce may be produced by picking for exceptionally high taxation on local business those corporations that are engaged also in the kind of interstate commerce that can be economically conducted only by being carried on in connection with local commerce. For an able discussion of this point see Gerard Carl Henderson, "The Position of Foreign Corporations in American Constitutional Law," 2 HARVARD STUDIES IN JURISPRUDENCE, Cambridge, Harvard University Press, 1918, chapter 7, especially pages 130–31. Mr. Henderson's contribution is of exceptional merit and importance. Its consideration of the struggle between the "restrictive" and the "liberal" theories of the nature of corporations at home and abroad, and of their shifting fortunes, throws a most helpful light on the cases in this series of articles which deal with state excises on domestic or foreign corporations.

facts alluded to as sufficient evidence of a sinister purpose, such as would justify this court in striking down the law. We could not do this without in effect denouncing the legislature of the State as guilty of a conscious attempt to evade the obligations of the Federal Constitution. Assuming the law was changed in 1910 because of a fear that the Cole Law would be held unconstitutional, the mere fact that, while excluding interstate earnings from the multiplicand, the multiplier was increased, is not of itself deemed sufficient evidence of an unlawful effort to burden a privilege that is not a proper subject of state taxation." [132]

This method of dismissal does not close the door to similar objections founded on economics and mathematics rather than on history. The record of state legislatures in the field of indirect action against interstate commerce is hardly one to blind the court to the possibility that now and then some state Solons may be "guilty of a conscious attempt to evade the obligations of the federal Constitution." Without venturing into the precarious enterprise of attempting to analyze motives, we may see signs in the cases reviewed in this discussion that state legislatures have not infrequently sought to attain in roundabout ways what there was good reason to believe might not be accomplished directly.[133]

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[132] 232 U. S. 576, 593, 34 Sup. Ct. Rep. 372 (1914).

[133] Objections based by complainants on the state constitution have a bearing on the commerce question. One road contended that the tax was confiscatory because the gross earnings from intra-state business were not sufficient to pay the actual operating expenses due to that business. Another road adduced in support of the same objection the allegations that it was not "able to earn, from interstate or intrastate business, or both combined, after paying necessary and proper expenses, including taxes other than the excise tax, a return on the investment in its railroad, or on the value thereof, equal to the current rate of return on legitimate high-grade investments at all times readily available in the market" (232 U. S. 576, 588). Reliance was placed on declarations of the Ohio court in earlier cases to the effect that certain provisions in the state constitution "are implied limitations upon the power of taxation of privileges and franchises, and limit such taxation to the reasonable value of the privilege or franchise conferred originally, or to its continued value from year to year," and that "these limitations prevent confiscation and oppression under the guise of taxation, and the power of taxation cannot extend beyond what is for the common or public welfare, and the equal protection and benefit of the people; but the ascertaining and fixing of such values rests largely in the general assembly, but finally in the courts" (*Ibid.*, 588–89).

To this the Supreme Court answered that the state court in the cases relied on "dealt with a general law and its operation on all corporations of given classes throughout the State, and not with its effect upon specific financially weak corporations; that it was not intended to hold that the courts as final arbiters might overthrow a law imposing a tax on privileges and franchises merely because in isolated cases such law

Only two more cases on gross-receipts taxes remain to be considered. Both were decided during the 1917 term of court. The Wisconsin demand in issue in *Northwestern Life Insurance Co.* v. *Wisconsin* [134] was in lieu of all others except taxes on real estate, and was sustained as a commutation tax. Income from real estate was not included in the assessment. The court did not find

"it necessary to decide whether the so-called foreign investment business of the company does or does not of itself amount to interstate commerce," [135]

since it held that,

"if it amounts to commerce of that character no burden is cast upon it by such tax as is here involved, since the gross receipts coming from that character of business are used only as a measure of the value of the property and franchise lawfully taxable in the State." [136]

The Supreme Court accepted the state court's "views of the nature and effect of the law," recognizing that they were not conclusive upon it, but finding "no reason to reject them." [137] Touching the effect of the tax, the state court had found that it did not appear from the allegations in the complaint "that the plaintiff now pays substantially greater sums than it would pay under either the income taxation system or the former personal property taxation system." [138] The rate of levy was three per cent. Nothing in the decision or the opinion closes the door to future contentions that the effect of a gross-receipts tax on selected property or businesses or corporations is to impose disproportionate burdens on interstate commerce and so to amount to a regulation of that commerce "in a constitutional sense." There is every reason to be-

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might impose a hardship, but only that those excise laws whose general operation is confiscatory and oppressive are unconstitutional" (*Ibid.*, 589). Mr. Justice Pitney added that it is not "to be inferred that the franchises of plaintiffs in error are valueless merely because it appears that the present earnings of the railroads are not sufficient to pay more than can be derived from legitimate high-grade investment securities that are readily available on the market, or (in the case of one of the roads) are not even sufficient to pay operating expenses. Upon this point we are content to refer to, without repeating, the language employed by Mr. Justice Miller, speaking for this court in State Railroad Tax Cases, 92 U. S. 575, 606."

[134] 247 U. S. 132, 38 Sup. Ct. Rep. 373 (1918).

[135] *Ibid.*, 138.

[136] *Ibid.*, 138.

[137] *Ibid.*, 137.

[138] *Ibid.*, 137.

lieve that the Supreme Court will insist that a gross-receipts tax, imposed as a substitute for property taxes, must be a fair substitute, and must not through excessive rates of levy take disproportionate toll from a selected class of taxpayers engaged in interstate commerce.

The gross-receipts tax declared invalid in *Crew Levick Co.* v. *Pennsylvania* [139] was imposed under the following provision of the statutes:

> "Each wholesale vender of or wholesale dealer in goods, wares and merchandise shall pay an annual mercantile license tax of three dollars, and all persons so engaged shall pay one-half mill additional on each dollar of the whole volume, gross, of business transacted annually." [140]

The state court had called the tax one "upon the business of vending merchandise." [141] The complainant during the year in question had received about $47,000 from intra-state sales, so that there was no doubt that it was subject to an occupation tax. It confined its objections to the levy on receipts of about $430,000 from customers in foreign countries, insisting that a tax on such receipts was both a regulation of foreign commerce and an impost upon exports. Of these objections Mr. Justice Pitney said that

> "although dual in form, the question may be treated as a single one, since it is obvious that, for the purposes of this case, an impost upon exports and a regulation of foreign commerce may be regarded as interchangeable terms." [142]

The decision may therefore be treated as one on the law of interstate commerce.

The Crew Levick case insistently demands comparison with *Ficklen* v. *Shelby County Taxing District* [143] on which the Commonwealth of Pennsylvania unsuccessfully relied. Formal distinctions between the statutes in the two cases readily suggest themselves. Mr. Ficklen would not have been subject to the Shelby County law if he had not asked for a license to do a general business, but had held himself out to do only interstate business. The Crew Levick Company would have been taxed under the Pennsylvania statute

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[139] 245 U. S. 292, 38 Sup. Ct. Rep. 126 (1917).
[140] *Ibid.*, 293.
[141] *Ibid.*, 295.
[142] *Ibid.*, 295.
[143] Note 23, *supra*.

though it had notoriously restricted its solicitations and ministrations to customers beyond the seas. By no limitation of its enterprise less than a complete abandonment could it exclude itself from the terms of the Pennsylvania law. Nor did it have the possibility enjoyed by Mr. Ficklen of having the exaction measured by the amount of capital employed in the business rather than by the gross receipts therefrom. From every dollar received from interstate or foreign commerce Pennsylvania inexorably demanded that it render tribute unto Caesar. Formally and technically, therefore, the Supreme Court was quite correct in saying that the authority of the Ficklen case "would have to be stretched in order to sustain such a tax as is here in question." [144] Hence formally and technically the Crew Levick case does not overrule the Ficklen case.

In substance, however, the situations of Mr. Ficklen and of the Crew Levick Company were approximately the same. If the Pennsylvania law had been identical with that of Shelby County, the Crew Levick Company would undoubtedly have asked for the same kind of license that Mr. Ficklen did. It would hardly have cut itself off from $47,000 of local business in order to avoid a tax of $215 on its receipts from foreign business. Nor would it be likely to suffer less by having the tax measured by the capital used in the business. Ten cents on each $100 of its capital would amount to more than $215 as soon as that capital exceeded $215,000. It would not appear to be material that the capital of the Crew Levick Company may be otherwise taxed by Pennsylvania, for there is no indication that Mr. Ficklen would have escaped the ordinary property tax on his capital if he had been fortunate enough to possess any.

Looking through form to substance, both Shelby County and the Commonwealth of Pennsylvania imposed an occupation tax measured by gross receipts from all business whether foreign or local. Had the Crew Levick Company, like Mr. Ficklen, done no local business whatever during the year in question, it would still have been within the terms of the Pennsylvania statute, but clearly would not have been engaged in a taxable occupation, and so would not have been caught, as he was caught, by reason of the peculiar provision of the Shelby County Law whereby taxability depended upon professions and not upon events. But here by the course of

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[144] 245 U. S. 292, 296, 38 Sup. Ct. Rep. 126 (1917).

events the Crew Levick Company was engaged in a taxable occupation. It was taxable and was taxed. The only dispute was over the measure of the tax. The Supreme Court disallowed that part of the measure which embraced receipts from commerce not confined to the state. It did not hold the Pennsylvania law void. If later the Pennsylvania court interprets the law as not applicable to concerns that refrain from local business,[145] the Supreme Court will have difficulty in applying the Crew Levick case without definitely overruling the Ficklen case.

In the absence of such a restrictive interpretation by the state court, the Supreme Court followed established practice[146] in refusing to rewrite the state law so as to bring it within the doctrine of the Ficklen case. Taking the Pennsylvania law as it reads, it plainly taxes interstate as well as local occupations; and, in so far as it makes the former a subject of taxation, it easily comes within the condemnation visited on those imposts which are "on interstate commerce itself" or on receipts from such commerce "as such."[147] Pennsylvania had not encased its demand in the fiction coating which is essential to bring it within those levies on interstate commerce which have been regarded as "merely incidental or indirect." At times this coating has seemed to need no other ingredient than words. The Crew Levick case naturally excites our curiosity whether a merely verbal compound can in these days turn poison into meat.

Mr. Justice Pitney's opinion indicates that it cannot. Not a little that he says is quite as applicable to the tax sustained in the Ficklen case as to that held invalid in the Crew Levick case. Of the former he says that "undoubtedly that case is near the border

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[145] For an instance of such construction by a state court of a statute imposing license taxes varying in amount according to the population of the towns and cities in which business was carried on, see Osborne *v.* Florida, 164 U. S. 650, 17 Sup. Ct. Rep. 214 (1897). In the cases of taxes on gross receipts the federal courts will make the necessary separation, when it is feasible, and hold void only that part on interstate receipts. Ratterman *v.* Western Union Telegraph Co., 127 U. S. 411, 8 Sup. Ct. Rep. 1127 (1888). But where a specific fee is imposed, the Supreme Court will not assume that the subject taxed is local business only if the language of the statute applies to any or all business. See cases cited in note 146.

[146] Leloup *v.* Port of Mobile, 127 U. S. 640, 8 Sup. Ct. Rep. 1380 (1888); Crutcher *v.* Kentucky, 141 U. S. 47, 11 Sup. Ct. Rep. 851 (1891); Williams *v.* Talladega, 226 U. S. 404, 33 Sup. Ct. Rep. 116 (1912).

[147] See cases cited in note 19, *supra.*

line." [148] One distinction which he draws is so frail that a breath of thought would disintegrate it. "Besides," he says,

> "the tax imposed in the *Ficklen Case* was not directly upon the business itself or upon the volume thereof, but upon the amount of commissions earned by the brokers, which, although probably corresponding with the volume of the transactions, was not necessarily proportionate thereto. For these and other reasons the case has been deemed exceptional." [149]

This assumed distinction is no more than that the Crew Levick Company sold their own products, while Mr. Ficklen was a somewhat independent intermediary between seller and purchaser. It is the distinction between receipts from commissions on sales and receipts from sales. One is quite as likely not to be necessarily proportional to the volume of the transactions, if this means the quantity of goods sold, as is the other. Even if by "volume of the transactions" Mr. Justice Pitney means the volume as measured by gross receipts, it cannot be important that the broker's commissions were not exactly proportional to the prices paid the seller. If the broker's part in the transaction is regarded as interstate commerce, his receipts are from interstate commerce, and whether he were paid by the day or the deal or by a percentage can hardly matter. In so far as there is any validity to the distinction suggested, it relates to the nature of the business involved in the different cases and not to the character of the statutes.

It is not unlikely that it is a distinction between the businesses that the learned Justice has in mind. This can hardly be gathered from the opinion in the Crew Levick case, but it finds support in an earlier opinion of the same Justice in *United States Fidelity & Guaranty Co.* v. *Kentucky* [150] which sustained a specific tax upon a mercantile agency engaged in reporting the financial responsibility of merchants who bought goods from without as well as from within the state. In that opinion Mr. Justice Pitney says:

> "The present case has no close parallel in former decisions, but in some of its aspects it bears a resemblance to the case of a tax imposed upon a resident citizen engaged in a general business that happens to include a considerable share of interstate business. *Ficklen* v. *Taxing District*, 145 U. S. 1. Or the business of the live stock exchange that was under

[148] 245 U. S. 292, 296, 38 Sup. Ct. Rep. 126 (1917).

[149] *Ibid.*, 297.

[150] 231 U. S. 394, 34 Sup. Ct. Rep. 122 (1913).

consideration in *Hopkins* v. *United States*, 171 U. S. 578, 592. Or the business of a cotton broker dealing in futures or options. *Ware* v. *Mobile County*, 209 U. S. 405." [151]

The Hopkins case and the Ware case held that the acts in question were not acts of interstate commerce. The collocation suggests that the broker who is a mere intermediary is less intimately connected with commerce than a vendor or his regular drummers. It is not likely that the court would go so far as to hold that such a sales broker, like the broker who furnishes exchange,[152] is not himself engaged in the commerce which he facilitates. But the passage above quoted has the aroma of the idea that Mr. Ficklen was a degree or two removed from direct participation in interstate commerce, and that therefore the tax which was sustained against him must be subjected to more rigid tests if ever it is sought to be imposed on those whose receipts are from interstate commerce instead of being receipts from receipts from interstate commerce. To the extent that the Ficklen case is now sought to be explained or apologized for on any such notion, it is excluded from the class of cases with which we are concerned and, from the standpoint from which we are considering it, is abandoned.

We hardly need, however, to enter upon such refinements to discern that, even if the Ficklen case still lives, its working days are over. Of the tax from which the Crew Levick Company was relieved, Mr. Justice Pitney says:

"It operates to lay a direct burden upon every transaction in commerce by withholding, for the use of the State, a part of every dollar received in such transactions. That it applies to internal as well as to foreign commerce cannot save it; . . . That portion of the tax which is measured by the receipts from foreign commerce necessarily varies in proportion to the volume of that commerce, and hence is a direct burden upon it." [153]

This would be quite as applicable to a tax specifically imposed on a local occupation but measured by receipts from all sources. To sustain a tax on interstate receipts, something more is now needed than the declaration of the state that it is merely using the receipts as the measure of a tax on something else that is taxable. The

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[151] 231 U. S. 399, 34 Sup. Ct. Rep. 122 (1913).
[152] Nathan *v.* Louisiana, 8 How. (U. S.) 73 (1850).
[153] 245 U. S. 292, 297–98, 38 Sup. Ct. Rep. 122 (1917).

court now demands that behind that declaration there must be something more substantial than words. The verbal distinction on which *Maine* v. *Grand Trunk Railway Co.*[154] originally rested has been replaced by substance. The Ficklen case, which leaned strongly on the Maine case for support, must be similarly reinterpreted before its foundations are solid, unless the court is willing to preserve an anomaly out of respect for *stare decisis.*

The only possible reinterpretation of the Ficklen case which can make it applicable to all kinds of interstate commerce is one which treats it as sanctioning the use of gross receipts to measure the "intangible property" of the taxpayer and thus to estimate values not reached by any other tax. This possibility finds some recognition in Mr. Justice Pitney's comment on the Pennsylvania tax to the effect that "it bears no semblance of a property tax, or a franchise tax in the proper sense; nor is it an occupation tax except as it is imposed upon the very carrying on of the business of exporting merchandise."[155] The Shelby County tax was not one that could be regarded as "on" a franchise or "on" property, unless a gainful occupation is to be deemed "intangible property." This notion of "intangible property" has not been entertained by the court except where the intangible has inhered in or been conceptually fused with something that was tangible. If pushed further and applied where nothing tangible is present, the so-called "intangible property" becomes so patently nothing but the value of an occupation or business that the court must inevitably recognize it as such.

Such recognition still leaves a loophole for the Ficklen case. It might conceivably squeeze through the opening left by the statement in the Crew Levick case that the tax there in issue is not "an occupation tax except as it is imposed upon the very carrying on of the business of exporting merchandise."[156] This leaves room for the notion that an occupation tax imposed on carrying on local business might be measured by receipts from all business, subject to the restriction that the expedient taxes but once and without discrimination the values contributed by interstate commerce. There is no reason, as we have seen,[157] why such values should go com-

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[154] Note 5, *supra.*

[155] 245 U. S. 292, 297, 38 Sup. Ct. Rep. 122 (1917).

[156] Cited in note 155, *supra.*

[157] 32 Harv. L. Rev. 260-62, and *Ibid.*, 398.

pletely untaxed. Where they arise from business unconnected with any use of property, they do go untaxed unless some form of income tax is allowed. The question must be whether Shelby County's form of income tax should be approved, or whether the states should be driven to adopt some other method less likely to invade the realm which the states must not enter.

The latest utterance of the Supreme Court indicates that the latter alternative is to be chosen. In sustaining the general income tax of Wisconsin, measured by net income, the opinion in *United States Glue Co.* v. *Oak Creek*[158] laid stress on the difference between gross receipts and net income. After contrasting the Crew Levick case with *Peck & Co.* v. *Lowe*,[159] which held that the federal income tax was not a tax on exports when measured by net income from an exporting business, Mr. Justice Pitney observed:

"The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or so to diminish the profit as to impede or discourage the conduct of the commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large." [160]

Here is wisdom that cannot be gainsaid. It applies so palpably to any occupation tax measured in whole or part by gross receipts from interstate commerce that the Ficklen case can hardly hope to survive the menace to its last remaining strength. With permission to tax net income from all commerce by a general state-wide income tax, the states can no longer complain that the death of the Ficklen case would compel them to confer a bounty on interstate commerce by exempting it from burdens which rest on local commerce. The gross-receipts taxes allowed in substitution

[158] 247 U. S. 321, 38 Sup. Ct. Rep. 499 (1918).
[159] 247 U. S. 165, 38 Sup. Ct. Rep. 432 (1918).
[160] 247 U. S. 321, 329–30, 38 Sup. Ct. Rep. 432 (1918).

for *ad valorem* taxes on railroad cars and other property may be distinguished on the ground that they represent the degree of use of such property more closely than do other taxes, and that the degree of use bears a fairly close relation to the responsibilities and possible expense which such property causes or is likely to cause the taxing authority.

This subject will be adverted to again in the succeeding section dealing with taxes on net incomes "as such."

(*To be continued.*)

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INDIRECT ENCROACHMENT ON FEDERAL AUTHORITY BY THE TAXING POWERS OF THE STATES.[1] VII

II. Regulations of Interstate Commerce (*concluded*)

2. *Taxes not Discriminating Against Interstate Commerce* (concluded)

C. Taxes on Acts, Occupations or Income (*concluded*)

II. *Taxes on Net Income "As Such"*

IT has already been disclosed that at the October, 1917, Term the Supreme Court in *United States Glue Co.* v. *Oak Creek*[2] sanctioned the inclusion of income from interstate commerce in a general state income tax measured by net income from all sources. The difference "between a tax measured by gross receipts and one measured by net income" was said to afford "a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental."[3]

The United States Glue Company was a domestic corporation; and in propounding and answering the question to be decided, Mr. Justice Pitney included that fact. After summarizing the provisions of the statute and their application to the plaintiff, he said:

> "Stated concisely, the question is whether a State, in levying a general income tax upon the gains and profits of a domestic corporation, may include in the computation the net income derived from transactions in interstate commerce without contravening the commerce clause of the Constitution of the United States."[4]

And the answer is stated as follows:

> "And so we hold that the Wisconsin income tax law, as applied to the plaintiff in the case before us, cannot be deemed to be so direct a

[1] For preceding instalments of this discussion see 31 Harv. L. Rev. 321–72 (January, 1918); *Ibid.*, 572–618 (February, 1918); *Ibid.*, 721–78 (March, 1918); *Ibid.*, 932–53 (May, 1918); 32 Harv. L. Rev. 234–65 (January, 1919); and *Ibid.*, 374–416 (February, 1919).

[2] 247 U. S. 321, 38 Sup. Ct. Rep. 499 (1918).

[3] 247 U. S. 321, 328, 38 Sup. Ct. Rep. 499 (1918).

[4] *Ibid.*, 326.

burden upon plaintiff's interstate business as to amount to an unconstitutional interference with or regulation of commerce among the States. It was measured not by the gross receipts, but by the net proceeds from this part of plaintiff's business, along with a like imposition upon its income derived from other sources, and in the same way that other corporations doing business within the State are taxed upon that proportion of their income derived from business transacted and property located within the State, whatever the nature of their business." [5]

These portions of the opinion, taken alone, would confine the decision to the point that a domestic corporation, engaged in both local and interstate commerce, cannot exclude interstate income from a tax on net income from all kinds of business which is imposed equally on other corporations doing business in the state. This was as far as the court had to go to dispose of the controversy before it. It was not called upon to say whether the result would have been the same in the case of an individual, a partnership or a foreign corporation or of a business that was exclusively interstate. It might, however, have narrowed its decision still further, as we shall see later.[6]

While the decision involved a domestic corporation and the court confined the case to such a corporation, there is no intimation in the opinion that an individual or partnership or foreign corporation would have occupied a more favorable position. Indeed, there are hints to the contrary. It is thought important to mention that the plaintiff was taxed "in the same way that other corporations doing business within the State are taxed, . . . whatever the nature of their business." [7] The incidence of a similar burden on other corporations is one of the reasons why this corporation cannot complain. The reasonable inference is that the court, in seeming in part of the opinion to confine the decision to the kind

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[5] 247 U. S. 321, 328, 38 Sup. Ct. Rep. 329 (1918).

[6] *Infra*, page 643–45.

[7] 247 U. S. 321, 329, 38 Sup. Ct. Rep. 499 (1918). This statement as to other corporations is not literally true, for, as we have seen from Northwestern Life Insurance Co. *v.* Wisconsin, 247 U. S. 132, 38 Sup. Ct. Rep. 444 (1918), 32 HARV. L. REV. 408 *ff.*, a gross receipts tax was levied on insurance companies in lieu of all other taxes except those on real estate. Public utilities are also excluded from the provisions of the income tax law and subjected to *ad valorem* assessment (note 34, *infra*). These exceptions, however, do not appear important, since the other methods of assessment are regarded as imposing burdens substantially equivalent to those which would result from subjection to the income tax.

of corporation that was before it, does not mean to suggest any such distinction between foreign and domestic corporations as appears to be made in dealing with excises measured by total capital stock.[8] And that the opinion is not confined to corporations is apparent from another paragraph in which reference is made to "persons." After distinguishing a tax on gross receipts from one on net income, Mr. Justice Pitney says of the latter:

> "Such a tax, when imposed upon net incomes from whatever source arising, is but a method of distributing the cost of government, like a tax upon property, or upon franchises treated as property; and if there be no discrimination against interstate commerce, either in the admeasurement of the tax or in the means adopted for enforcing it, it constitutes one of the ordinary and general burdens of government, from which persons and corporations otherwise subject to the jurisdiction of the States are not exempted by the Federal Constitution because they happen to be engaged in commerce among the States." [9]

The qualifying phrase "otherwise subject to the jurisdiction of the state" opens the door to the inquiry whether a foreign corporation engaged exclusively in interstate commerce could be taxed on its net income earned within the state. Such corporations are "subject to the jurisdiction of the state" from the standpoint of service of judicial process,[10] and taxation of property.[11] But they

[8] Compare Looney *v.* Crane Co., 245 U. S. 178, 38 Sup. Ct. Rep. 85 (1917), 31 Harv. L. Rev. 600–18, with Kansas City, M. & B. R. R. Co. *v.* Stiles, 242 U. S. 111, 37 Sup. Ct. Rep. 58 (1916), 31 Harv. L. Rev. 599–600. See also 33 Political Science Quarterly, 557, note 1.

[9] 247 U. S. 321, 329, 38 Sup. Ct. Rep. 499 (1918).

[10] International Harvester Co. *v.* Kentucky, 234 U. S. 579, 34 Sup. Ct. Rep. 944 (1914).

[11] This does not appear to have been established by explicit decision, but the many cases holding that foreign corporations engaged partly in interstate commerce are not entitled to exemption from property taxation convey no hint that the result would be different if the business in which the property was employed was exclusively interstate. In St. Louis *v.* Wiggins Ferry Co., 11 Wall. (78 U. S.) 423 (1871), the only reason given for holding that the property of a foreign corporation engaged exclusively in interstate commerce was not taxable in St. Louis was that the property had no taxable situs there. In Henderson Bridge Co. *v.* Kentucky, 166 U. S. 150, 17 Sup. Ct. Rep. 532 (1897), in which Kentucky was allowed to tax the Kentucky part of an interstate bridge owned by a Kentucky corporation, it appeared from the statement of facts that Illinois had assessed that part of the bridge which lay within its borders. In Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 206, 5 Sup. Ct. Rep. 826 (1885), Mr. Justice Field declared: "It is true that the property of corporations engaged in foreign or interstate commerce, as well as the property of corporations

are not subject to the jurisdiction so as to be liable to a privilege tax on the conduct of their business,[12] or to certain police requirements set forth as a condition on bringing suit in the state courts.[13] Are they so subject to the jurisdiction as to be liable to a tax on their net income? Mr. Justice Pitney plainly intimates that they are. A tax on net income, he says, is "like a tax upon property, or upon franchises treated as property." It is "but a method of distributing the cost of government"; it "constitutes one of the ordinary and general burdens of government." If the property of those engaged exclusively in interstate commerce is not exempt from state taxation, there is no reason to accord them immunity from a tax on their net income, which is "but a method of distributing the cost of government, like a tax upon property." The important thing in the mind of the court seems to be the generality of the burden, with the consequent impossibility of discrimination against interstate commerce.

The result of this venture at mind-reading coincides with the analysis previously given of state taxes on property assessed by capitalizing the income earned from its use. To repeat Mr. Carter's concession in his brief for the companies in the Ohio Express cases:

"Inasmuch as the existence of the States is necessary to the existence of interstate commerce, that ordinary system of taxation which is

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engaged in other business, is subject to State taxation, provided always it be within the jurisdiction of the State." As the case before the court involved a foreign corporation engaged exclusively in interstate commerce, it is fair to presume that the *dictum* above quoted was uttered with such a corporation in mind. In Old Dominion Steamship Co. *v.* Virginia, 198 U. S. 299, 25 Sup. Ct. Rep. 686 (1905), the inference from the statement of facts is that the tug "Germania," which was one of the vessels of a foreign corporation held taxable in Virginia, was engaged exclusively in interstate commerce, though this fact is not mentioned in the opinion. Property owned by a foreign corporation and employed exclusively in work for the United States government is taxable. Gromer *v.* Standard Dredging Co., 224 U. S. 362, 32 Sup. Ct. Rep. 499 (1912). The conclusion is irresistible that the many declarations that property is not exempt from state taxation because it is employed in interstate commerce are intended to apply to property of foreign corporations engaged exclusively in that commerce.

[12] Cheney Brothers Co. *v.* Massachusetts, 246 U. S. 147, 38 Sup. Ct. Rep. 295 (1918); York Manufacturing Co. *v.* Colley, 247 U. S. 21, 38 Sup. Ct. Rep. 430 (1918).

[13] International Text Book Co. *v.* Pigg, 217 U. S. 91, 30 Sup. Ct. Rep. 481 (1910); International Text Book Co. *v.* Lynch, 218 U. S. 664, 31 Sup. Ct. Rep. 225 (1910); Buck Stove Co. *v.* Vickers, 226 U. S. 205, 33 Sup. Ct. Rep. 41 (1912); Sioux Remedy Co. *v.* Cope, 235 U. S. 197, 35 Sup. Ct. Rep. 57 (1914).

necessary to the existence of the States, namely, taxation upon all property within them, must be permitted, and the property employed in interstate commerce is not to be exempted. . . . Were it not subject to taxation in this form the effect would be to confer upon it an affirmative advantage equivalent to a pecuniary bounty equal to the amount of the tax from which it is exempted." [14]

With the advent of general state-wide income taxes, the "ordinary system of taxation which is necessary to the existence of the states" is no longer confined to property taxation. The income tax has come to constitute one of the "ordinary and general" burdens of government. Reason and psychology combine to warrant the expectation that the Supreme Court will not exclude foreign corporations engaged exclusively in interstate commerce from the "corporations otherwise subject to the jurisdiction of the states" with respect to taxes on net incomes.[15]

It seems safe, therefore, to state the principle of the Oak Creek case by saying that a general state-wide tax on net income is not "an unconstitutional interference with or regulation of commerce among the states" by reason of the inclusion of net income from

[14] This passage is quoted more at length in 32 HARV. L. REV. 261.

[15] This position is taken by the supreme court of Wisconsin in Superior *v.* Allouez Bay Dock Co., 166 Wis. 76, 80, 164 N. W. 362 (1917), in which Chief Justice Winslow says:

"It must be admitted that the defendant's income arose entirely from interstate commerce business. . . . Is the levying of an income tax measured by the income so derived a burden upon interstate commerce?

"The question is not free from difficulty, but we think it must be answered in the negative. Income taxation is not taxation of property, but is more nearly akin to taxes levied upon privileges or occupations. Its amount may be measured by the receipts of the business, but it is not in any true sense a tax upon the business itself. The subject is covered, as it seems to us, by the decisions of this court in *United States Glue Co.* v. *Oak Creek*, 161 Wis. 211, 153 N. W. 241, and *Northwestern Mut. L. Ins. Co.* v. *State*, 163 Wis. 484, 155 N. W. 609, 158 N. W. 328, and the cases therein cited."

The cases relied on do not involve concerns whose business was exclusively interstate, so the declaration in the Superior case is no more than the assertion that this does not seem material to the court. Moreover, the decision in the Superior case that those engaged exclusively in interstate commerce may be constitutionally subjected to a tax on their net income was a declaration on a moot point, because the case held that the defendant was exempted from income taxation, for the reason that the property from which the income was derived was railroad property, and the complainant was therefore entitled to the benefit of the provision in the Income Tax Law which exempts "incomes derived from property and privileges by persons now required by law to pay taxes or license fees directly into the treasury of the state in lieu of taxes" (166 Wis. 76, 81).

interstate commerce. The court emphasizes the point that, in the absence of discrimination, the effect of such a tax on interstate commerce is "indirect" and therefore constitutionally innocuous. It regards this effect as identical with the effect on exports of the federal net income tax on income from an exporting business. Two weeks earlier in *Peck & Co.* v. *Lowe*[16] the court had held that it was not a tax on exports to tax the net income of an exporting business. In the opinion Mr. Justice Van Devanter had said:

"The tax in question is unlike any of those heretofore condemned. It is not laid on articles in course of exportation, or on anything which inherently or by the usages of commerce is embraced in exportation or any of its processes. On the contrary, it is an income tax laid generally on net incomes. . . . It is both nominally and actually a general tax. . . . There is no discrimination. At most, exportation is affected only indirectly and remotely. The tax is levied after exportation is completed, after all expenses are paid and losses adjusted, and after the recipient of the income is free to use it as he chooses. Thus what is taxed — the net income — is as far removed from the exportation as are articles intended for export before the exportation begins."[17]

This passage was paraphrased by Mr. Justice Pitney in the Oak Creek case, prefatory to pointing out the distinction between the measures of gross and of net income and to minimizing the deterrent effect on interstate commerce of the latter, since a tax on net profits "does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large."[18]

We may take it for granted, then, that the legal character of the recipient and the nature of the business in which the recipient is engaged are immaterial elements in considering the constitutionality of a state-wide, all-inclusive general tax on net income from business done within the state. The recipient may be an individual, a partnership, a domestic or a foreign corporation. The business may be exclusively interstate. But the tax must be general, and the measure must probably be net, and not gross, income, with the possible qualification that some latitude will be allowed the states in prescribing what are permissible deductions by way

[16] 247 U. S. 165, 38 Sup. Ct. Rep. 432 (1918).
[17] 247 U. S. 165, 174–75, 38 Sup. Ct. Rep. 432 (1918).
[18] 247 U. S. 321, 329, 38 Sup. Ct. Rep. 499 (1918).

of interest on indebtedness, expenses, etc., in assessing the taxable net income. The statement that the legal character of the recipient and the source of the income are not significant is not meant to preclude further inquiry into the taxability of income from extra-state business or from interest or other compensation paid by the national government. In determining the constitutionality of state taxation of such income, the legal status of the recipient is likely to be of controlling importance.[19]

It is doubtless a wholly moot question whether a general state tax on gross income would pass muster with the Supreme Court. No such tax is likely to be levied. It would bear most unequally on different individuals and different enterprises. This consideration will probably always receive more weight from legislators than that which will be given to the opposing element that in some instances volume of transactions bears a closer relation to the cost of governmental supervision than does the balance at the end of the fiscal year. Such exceptional instances may be taken care of by gross-income taxes in lieu of other taxes. If, however, a state should seek to impose a general tax on gross income, it will have to reckon with Mr. Justice Pitney's opinion in the Oak Creek case, which plainly discountenances the inclusion of receipts from interstate commerce in such a tax. No actual decision, however, precludes such inclusion. All of the gross income taxes that have been declared unconstitutional have been levies on selected enterprises. So far as words go, a general tax on gross income can be called "but a method of distributing the cost of government," as readily as can a general tax on net income. And there is an indication in Mr. Justice Bradley's opinion in *Philadelphia & Southern Mail S. S. Co.* v. *Pennsylvania* [20] that in 1887 the Supreme Court was inclined to think that a general state income tax could levy on receipts from interstate commerce, even though the measure of the tax was gross, rather than net, income.

This opinion is referred to by Mr. Justice Pitney in the Oak Creek case, in which he quotes Mr. Justice Bradley as saying:

"The corporate franchises, the property, the business, the income of corporations created by a state may undoubtedly be taxed by the state; but in imposing such taxes care should be taken not to interfere

[19] See *infra*, pages 649 *ff.*

[20] 122 U. S. 326, 7 Sup. Ct. Rep. 1118 (1887).

with or hamper, directly or by indirection, interstate or foreign commerce, or any other matter exclusively within the jurisdiction of the Federal government." [21]

Previously Mr. Justice Pitney says that the subject of consideration in the Philadelphia case was "the distinction between direct and indirect burdens, with particular reference to a comparison between a tax upon the gross returns of carriers in interstate commerce and a general income tax imposed upon all inhabitants incidentally affecting carriers engaged in such commerce. . . ."[22] From this Mr. Justice Pitney proceeds to point out "the correct line of distinction," as illustrated in *Crew Levick Co.* v. *Pennsylvania*[23] and *Peck & Co.* v. *Lowe*.[24]

Between these two cases there was a double distinction. One involved a tax on gross receipts imposed on selected enterprises; the other, a tax on net income imposed generally on all enterprises and individuals. When Mr. Justice Bradley made "particular reference to a comparison between a tax upon the gross returns of carriers engaged in interstate commerce and a general income tax imposed on all inhabitants," [25] he appears to have had in mind only the distinction between generality and partiality. There is no indication that he thought it material whether a general income tax was on gross, or on net, income. The pertinent paragraph of his opinion is the one immediately preceding that from which Mr. Justice Pitney quotes. After saying that "there is another point, however, which may properly deserve some consideration," Mr. Justice Bradley continues:

"Can the tax in this case be regarded as an income tax? And, if it can, does that make any difference as to its constitutionality? We do not think that it can properly be regarded as an income tax. It is not a general tax on the incomes of all the inhabitants of the state, but a special tax on transportation companies. Conceding, however, that an income tax may be imposed on certain classes in the community, distinguished by the character of their occupations, this is not an income tax on the class to which it refers, but a tax on their receipts for trans-

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[21] 122 U. S. 326, 345, 7 Sup. Ct. Rep. 1118 (1887); quoted in 247 U. S. 321, 327, 38 Sup. Ct. Rep. 499 (1918).

[22] 247 U. S. 321, 327, 38 Sup. Ct. Rep. 499 (1918).

[23] 245 U. S. 292, 38 Sup. Ct. Rep. 126 (1917), 32 Harv. L. Rev. 409 ff.

[24] Note 16, *supra*.

[25] Note 23, *supra*.

portation only. Many of the companies included in it may, and undoubtedly do, have incomes from other sources, such as rents of houses, wharves, stores, and water power, and interest on moneyed investments. . . . It is unnecessary, therefore, to discuss the question which would arise if the tax were properly a tax on income. It is clearly not such, but a tax on transportation only." [26]

Here obviously Mr. Justice Bradley regards generality as the only essential of a tax "properly a tax on income." He lays no foundation for the distinction between gross and net income relied on by Mr. Justice Pitney in sustaining the Wisconsin income tax. Nor was it necessary to draw such a distinction in the Oak Creek case, since the generality of the tax there involved would have differentiated it from all taxes previously declared invalid. Had the court been inclined to narrow its decision as much as possible, the opinion might easily have declared that, since the Wisconsin tax was both general and measured by net income, there was no bar against its application to income from interstate commerce, thereby explicitly leaving open for future determination the question whether either of these qualifications in the absence of the other would entitle the law to the same approval. But, in so far as the opinion rather than the decision is to be looked at as expressing the law for which the case stands, it seems necessary to conclude that a general income tax on gross receipts cannot take toll from interstate commerce.

Such gross receipts from interstate as well as local commerce may, as we have seen,[27] be the measure of a tax in lieu of a property tax, provided the burden thereby imposed is not substantially heavier than what would be laid by the ordinary property tax. If this is true of gross-receipts taxes on selected corporations or enterprises, it must also be true of a general tax on gross receipts in lieu of a property tax. But such a tax is not likely to be adopted east or west of Russia. One may with safety follow Henry George far enough to disapprove of relieving real estate from *ad valorem* taxes in order to take only a percentage of the realized gross returns. And though we may anticipate that, in many states, income taxes will soon be substituted for other demands on chattels as well as on intangibles, it is inconceivable that such income taxes will be

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[26] 122 U. S. 326, 344–45, 7 Sup. Ct. Rep. 1118 (1887).
[27] 32 Harv. L. Rev. 377–416.

guilty of the inequalities of burden that would ensue from allowing to no one any deduction from gross receipts.

This brings us to the element in the Wisconsin income tax that the Supreme Court did not mention. Nothing was said in the opinion in the Oak Creek case about the extent to which the tax was in lieu of other demands. There is no hint that a state has to exempt property of any kind in order to include receipts from interstate commerce in a general tax on net incomes. Yet the Supreme Court was undoubtedly aware of the fact that the Wisconsin tax was one substantially in lieu of all other taxes on chattels and intangibles. In *Northwestern Mutual Life Insurance Co.* v. *Wisconsin* [28] the opinion of Mr. Justice Day quoted a statement from the Wisconsin supreme court to the effect that the Income Tax Law "marked the abandonment of the attempt to levy personal property taxes upon" securities and credits.[29] Whether it was called to the attention of the Supreme Court that Wisconsin also allowed taxes on chattels to be deducted from the assessment of the income tax does not appear; but such was the case,[30] and the Supreme Court would hardly have neglected to inquire about it had it been regarded as important. The general nature of the Wisconsin tax was thus summarized by Chief Justice Winslow of the Wisconsin supreme court in an opinion rendered in 1912:

"By the present law it is quite clear that personal property taxation is for all practical purposes becoming a thing of the past. The specific exemptions of all money and credits and the great bulk of stocks and bonds, as well as of all farm machinery, tools, wearing apparel, and household furniture in actual use, regardless of value, goes far to eliminate taxation of personal property; while the provision that he who pays personal property taxes may have the amount so paid credited on his income tax for the year seems to put an end to any effective taxation of personal property. That taxation of such property has proven a practical failure will be admitted by all who have given any attention to the subject. Doubtless this was one of the main arguments in the legislative mind for the passage of the present act. By this act the legislature has, in substance, declared that the state's system of taxation shall be changed from a system of uniform taxation of property (which so far as personal property is concerned has proven a failure) to

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[28] 247 U. S. 132, 38 Sup. Ct. Rep. 444 (1918).

[29] 247 U. S. 132, 136, 38 Sup. Ct. Rep. 444 (1918).

[30] Wisconsin Stat. (1915), chap. 48 *a*, § 1087 *m*–26.

a system which shall be a combination of two ideas, namely, taxation of persons progressively, according to ability to pay, and taxation of real property uniformly, according to value." [31]

Thus the Wisconsin tax was substantially one in lieu of all other taxes except those on real estate. Unlike the gross-receipts tax on insurance companies sustained in *Northwestern Mutual Life Insurance Co.* v. *Wisconsin*,[32] the net-income tax included the income from real estate,[33] so that the economic interest in land was taxed twice. Such a double burden might conceivably have raised a question under the commerce clause in the case of railroads had they been subject to the income tax. If the assessment of their real estate took account of the value contributed by the use to which it was put, and the value of that use was again tapped by an income tax, there would be some basis for a contention that the state had created a tax system whereby interstate carriers were taxed more heavily than many kinds of local business. In Wisconsin, however, railroads are not subject to the income tax, but are assessed by the *ad valorem* method which in practice gets at the "intangible" value contributed by the income.[34] And chattels and intangibles pay but one tax. The Supreme Court, however, did not mention this element in the situation before it. It would seem, then, that it means to allow a general state tax on net incomes to take toll from interstate commerce, even though the tax is in addition to familiar and customary levies on chattels and choses in action. This, however, is the inference from silence and neglect, and not from anything vocal. Explicit consideration may move the court to a different conclusion.

If we may assume that a state is determined that state and local governments are to get a definite amount of revenue, the question whether a general income tax is in lieu of other demands does not seem of great importance. Such an income tax is *pro tanto* in lieu of other demands, whether specific property is exempted or not, since it necessarily reduces the assessment or the rate of levy on other sources of revenue. Our assumption that some predeter-

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[31] Income Tax Cases, 148 Wis. 456, 505–06, 134 N. W. 673 (1912).

[32] Note 28, *supra*. See page 135 of the opinion. See also WISCONSIN STAT. (1915), chap. 51, § 51.32 (1) (page 867).

[33] WISCONSIN STAT. (1915), chap. 48 *a*, § 1087 *m*–2. 2 (*a*).

[34] See Superior *v.* Allouez Bay Dock Co., note 15, *supra*. See also WISCONSIN STAT. (1915), chap. 48 *a*, § 1087 *m*–5 (2)., and chap. 51.

mined amount is certain to be raised by the state, whatever the methods adopted, is of course open to question. The actual situation may be one in which an income tax is not a substitute for other demands, but is the only feasible method of obtaining additional revenue. But even so, if the income tax does not bear more heavily on interstate business than on local business, there seems to be no controlling reason why the interstate business should be held inviolate, whether the income tax is supplementary to, or in lieu of, other taxes.

The opinion of the Supreme Court in *United States Glue Co.* v. *Oak Creek* [35] shakes the criticism heretofore [36] passed upon *Baldwin Tool Works* v. *Blue*,[37] in which the federal district court for the northern district of West Virginia sustained the West Virginia excise on corporations. Judge Pritchard supported the inclusion of net receipts from interstate commerce on the authority of the decisions approving the assessment of railroad property by capitalizing net earnings,[38] and sanctioning a gross-receipts tax in lieu of others.[39] He appears to minimize the issue unduly when he says:

> "While the statute imposes a special tax in addition to other license taxes, ascertained in some instances by the income that may arise in interstate transactions, nevertheless this is not a tax upon interstate commerce, nor can we conceive of any theory upon which it may be properly said to be a burden upon interstate commerce." [40]

Judge Pritchard evidently proceeds upon the familiar and somewhat exploded distinction between the subject and the measure of the tax, when he argues that "the fact that the measure of that tax may be determined partly from the business of an interstate character could not be said to be such an interference with interstate commerce as to render the act unconstitutional."[41] He does not mention *Galveston, H. & S. A. Ry. Co.* v. *Texas*,[42] nor indicate

[35] Note 2, *supra*.

[36] 31 Harv. L. Rev. 760–75. In making this criticism, the writer proceeded on the assumption that there was no distinction between an excise measured by net earnings and one measured by gross receipts.

[37] 240 Fed. 202 (1916).

[38] Cleveland, C., C. & St. L. Ry. Co. *v.* Backus, 154 U. S. 439, 14 Sup. Ct. Rep. 1122 (1894).

[39] United States Express Co. *v.* Minnesota, 223 U. S. 335, 32 Sup. Ct. Rep. 211 (1912).

[40] 240 Fed. 202, 205 (1916).

[41] *Ibid.*, 206.

[42] 210 U. S. 217, 28 Sup. Ct. Rep. 638 (1908), 32 Harv. L. Rev. 385 *ff*.

that he would have decided differently had the tax been measured by gross, rather than by net, income. But the distinction between the two, elaborated and relied on by the Supreme Court in the Oak Creek case, may be found sufficient to support the West Virginia excise, even though it falls only on corporations and is in addition to other demands.

As to corporations engaged partly in local business, there is no question of taxability, and the measure of the tax may be forgiven on the ground of its indirect effect on interstate commerce and the remnant of arbitrary power over domestic corporations and over the local business of foreign corporations. Where this arbitrary power has thus far been curbed, the complaint was against the extra-territorial incidence of the tax.[43] In view of the decision in the Oak Creek case that a general tax on net income does not regulate interstate commerce by including income from that commerce, an excise on all corporations may be deemed to have sufficient generality to be accorded similar recognition. Some weight, however, should be given to the probability that the exemption of farmers, merchants and others conducting business as individuals from burdens borne by corporations will tend to relieve a considerable proportion of local business from demands that few engaged in interstate commerce will escape. Here is a fighting chance for the contention that an income tax applicable only to corporations must by and large bear more heavily on interstate business than on local business, and therefore amounts to an unconstitutional regulation of interstate commerce.

Foreign corporations engaged exclusively in interstate commerce have still a stronger ground on which to resist the West Virginia tax. For anything thus far decided, such corporations would seem still to have the shield that they are not subject to an excise tax, no matter how it is measured. The subject selected for taxation has long been regarded as immune from the jurisdiction of the state. If the Cheney Brothers Company [44] and the York Manufacturing Company [45] were permitted to disregard the corporation laws of Massachusetts and of Texas respectively, because they

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[43] See 32 HARV. L. REV. 384–417. See also Henderson, "The Position of Foreign Corporations in American Constitutional Law," 2 HARVARD STUDIES IN JURISPRUDENCE, chapters VII, VIII, and IX.

[44] Cheney Brothers Co. *v.* Massachusetts, note 12, *supra*.

[45] York Manufacturing Co. *v.* Colley, note 12, *supra*.

were foreign corporations engaged exclusively in interstate commerce, it would seem to follow that they and those like them are similarly immune from West Virginia's excise on corporations. It cannot be said of this tax, as Mr. Justice Pitney said of the Wisconsin income tax, that "such a tax, when imposed upon net incomes from whatever source arising, is but a method of distributing the cost of government, like a tax upon property, or upon franchises treated as property." [46] The subject taxed is not income, but doing business in corporate form. The tax does not fall on "net incomes from whatever source arising," but only on net incomes arising from the exercise of corporate functions. When those functions are exclusively interstate commerce, and the corporation is foreign rather than domestic, a tax on the exercise of those functions is called a tax "on interstate commerce itself," and therefore without the fold of state power.

There can be no question that this is a correct statement of the law to be induced from the Supreme Court decisions to date. Whether the law will continue as it now is does not admit of the same confident assertion. If we assume that foreign corporations engaged exclusively in interstate commerce may be subjected to a general state tax on net income,[47] and that foreign corporations engaged in combined local and interstate commerce cannot exclude interstate income from a state excise on all corporations measured by their net income from all business within the state,[48] there seems no reason in sense or in economics why a foreign corporation engaged exclusively in interstate commerce should be relieved from an excise imposed equally on all corporations. Their interstate income should be no more sacrosanct than is that of the foreign corporations which are fortunate or unfortunate enough to enjoy some local income in addition. But the West Virginia statute calls its exactions on corporations "an annual special excise tax for the privilege of carrying on or doing business in the state"; [49] and under all the law that we know from existing cases the privilege of carrying on interstate commerce alone or the doing of interstate business alone is not a taxable subject. West Virginia does not impose its tax "on net income" received by corporations, but "on

[46] *Cit. supra*, note 9.

[47] See *supra*, pages 636–39.

[48] See *supra*, pages 645–46.

[49] The West Virginia statute is quoted more at length in 31 HARV. L. REV. 761.

the privilege of carrying on . . . business." The net income is the "measure," and not the "subject," of the tax. Granting *arguendo* that the net income of all corporations from whatever source derived is a proper subject of state taxation, that is not the legal *res* which West Virginia has named as the object of its desire. The Supreme Court must rewrite the West Virginia statute in order to escape from the decisions [50] which hold that interstate commerce, whether done by individuals or by corporations, is not a legitimate subject of state taxation.

The court has consistently declined to rewrite statutes or ordinances imposing specific taxes on the privilege of doing any business whatever,[51] even though the identical tax might be imposed on local business alone.[52] It has, however, held that the nominal subject of the tax was not the actual subject, when taxes purporting to be on the privilege of a foreign corporation to engage in local business have been discovered to be substantially taxes on extra-state property of the corporation because measured by total capital stock.[53] The developments since 1910 show the waning of the once controlling influence of the formal distinction between the subject and the measure of the tax. Unless the court is to be more zealous to discover vice than virtue, it may as easily hold that a tax in substance laid on the net income of all corporations will be dealt with as such a tax, in spite of the fact that it is called by the statute an annual special excise for the privilege of carrying on business.

Precedent for such action is not wanting. In *Postal Telegraph Cable Co.* v. *Adams*,[54] as we have seen, a tax described by the statute as a privilege tax was held to be a levy on the property of the company and therefore a valid demand. Similar courtesies have been shown to other taxes found to be in lieu of property taxes.[55] If a

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[50] Some of these decisions are cited in 32 HARV. L. REV. 380, note 34.

[51] Cases cited in 32 HARV. L. REV. 411, note 146.

[52] Osborne *v.* Florida, 164 U. S. 650, 17 Sup. Ct. Rep. 214 (1897). See *infra*, pages 669–70.

[53] 31 HARV. L. REV. 584–618, considering the Western Union case and those following it.

[54] 155 U. S. 688, 15 Sup. Ct. Rep. 268 (1895); 32 HARV. L. REV. 249.

[55] See 32 HARV. L. REV. 389. For an instance of judicial rewriting of a statute to relieve a tax of the charge of being an imposition on an instrumentality of the federal government, see Western Union Telegraph Co. *v.* Massachusetts, 125 U. S. 530, 8 Sup. Ct. Rep. 961 (1888), 32 HARV. L. REV. 239.

verbal defect was forgiven in these cases, there is no apparent common-sense reason why it should not be forgiven in West Virginia's excise on corporations. Once it is granted that a tax on the net income of all corporations need not loose its hold when it comes to income from interstate commerce, even though such income is all that a complaining foreign corporation receives, there is no substantial ground for sparing such income because the tax calls itself an excise on doing business rather than a tax "on net income received by corporations." It is to be anticipated, therefore, that the Supreme Court, if it determines to treat a tax on corporate income in the same way that it regarded Wisconsin's tax on all income, will find little difficulty in taking the further step that a tax, though formally on the business itself, is substantially on the net income from that business and is therefore entitled to the same consideration that would be bestowed on a tax designated as one on such net income.

There remains for consideration the bearing of the commerce clause on complaints of the vice of extra-territoriality in the assessment of an income tax. It has already been suggested that the legal status of the recipient of income may be a factor in cases where it is objected that a state has levied on income from extra-state sources or on income to which extra-state activities have contributed. In dealing with such complaints it will be necessary to determine what basis or bases of jurisdiction underlie the imposition of income taxes. The Western Union case and those following it establish that the taxation of foreign corporations engaged in interstate commerce by a method which takes account of extra-state values is an invalid regulation of interstate commerce as well as a denial of due process of law. This doctrine must apply to taxes on income or to taxes measured by income as forcibly as to taxes measured by property. Plainly foreign corporations engaged wholly or partly in interstate commerce can insist that extra-state income as well as extra-state property is beyond the reach of the state by direct or indirect action.

What can be done with foreign corporations engaged exclusively in local business does not fall strictly within the scope of this study, although the cases that have been reviewed are the ones which throw light on the problem. If *Horn Silver Mining Co.* v. *New York*[56]

[56] 143 U. S. 305, 12 Sup. Ct. Rep. 403 (1892).

is still law, it would seem that such foreign corporations may be subjected to an excise measured by their total income as readily as to one measured by their total capital stock. The possibility of the early demise of the Horn case has already been suggested.[57] Mr. Henderson in his admirable study of *The Position of Foreign Corporations in American Constitutional Law*[58] argues forcibly for the view that the decision must be regarded as already abandoned.[59] This is a legitimate inference from the opinion of Mr. Justice Van Devanter in *International Paper Co.* v. *Massachusetts*,[60] in which the due-process objections to an excise measured by extra-territorial values appear to be treated as entirely independent of the commerce clause. The opinion of Mr. Justice Holmes in *Equitable Life Assurance Society* v. *Pennsylvania*[61] may also be taken as an implied obituary of the Horn case. This case sustained a tax on a foreign insurance company which included a percentage of premiums paid in other states on policies on the lives of residents of the taxing state, notwithstanding the ruling that such premiums, separately considered, afford no basis for a tax on a company that has ceased to solicit business or to collect premiums in the taxing state.[62] Though the Equitable case came within the doctrine of arbitrary power declared in the Horn case, it was not put on that ground by the court. Instead, Mr. Justice Holmes pointed out that many incidents of the contracts insuring the lives of residents were likely to be attended to in Pennyslvania, such as the payment of dividends and the adjustment of claims, and added:

"It is not unnatural to take the policy holders residing in the State as a measure without going into nicer if not impracticable details. Taxation has to be determined by general principles, and it seems to us impossible to say that the rule adopted in Pennsylvania goes beyond what the Constitution allows." [63]

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[57] 31 Harv. L. Rev. 613, 758, 759.

[58] Henderson, "The Position of Foreign Corporations in American Constitutional Law," 2 Harvard Studies in Jurisprudence, Cambridge, Harvard University Press, 1918.

[59] For a statement of Mr. Henderson's argument, and a presentation of considerations against its validity as an expression of the present state of the law, see 33 Political Science Quarterly, 558–65. [60] 246 U. S. 135, 38 Sup. Ct. Rep. 292 (1918).

[61] 238 U. S. 143, 35 Sup. Ct. Rep. 829 (1915).

[62] Provident Savings Life Assurance Society *v.* Kentucky, 239 U. S. 103, 36 Sup. Ct. Rep. 34 (1915).

[63] 238 U. S. 143, 147, 35 Sup. Ct. Rep. 829 (1915).

Here is a pretty plain implication that an excise measured by premiums which have no relation whatever to the taxing state would have gone beyond what the Constitution allows. The states, therefore, have had a clear warning of the risks they run in seeking to levy on the extra-state income of any foreign corporation.

Such taxation of extra-state income can be justified, if at all, only by the possession of some power over the recipient. The income, as such, is not taxable by a state which has no other relation towards it than that of covetousness. It is at best exceedingly doubtful whether the requisite power exists over any foreign corporation. As to domestic corporations the case is not so clear. Such corporations, whatever their business, may be subjected to any demand exacted as a price for the privilege of coming into being.[64] Through control over the corporate entity *en ventre sa mère*, the state may accomplish indirectly what it cannot attain directly. With reserved power to amend or repeal the corporate charter, this initial arbitrary power may possibly be transformed into a continuing one. But, if so, it must be exercised as an assertion of such arbitrary power, or else find adequate justification on independent grounds. This appears clearly from Mr. Justice Harlan's opinion in *Louisville & Jeffersonville Ferry Co.* v. *Kentucky*,[65] in which it was held a taking of property without due process of law to include in the valuation of the Kentucky franchise of an interstate ferry the value of the Indiana franchise of the same concern. After stating the conclusion that Kentucky cannot in effect tax the incorporeal hereditament which has its situs in another state, Mr. Justice Harlan continues:

"This view is not met by the suggestion that Kentucky can make it a condition of the exercise of corporate powers under its authority that

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[64] Railroad Co. *v.* Maryland, 21 Wall. (U. S.) 456 (1874), 31 HARV. L. REV. 578; Ashley *v.* Ryan, 153 U. S. 436, 14 Sup. Ct. Rep. 865 (1894), 31 HARV. L. REV. 580; Kansas City, M. & B. R. Co. *v.* Stiles, 242 U. S. 111, 37 Sup. Ct. Rep. 58 (1916), 31 HARV. L. REV. 599. The same rule is assumed to apply to charter requirements of a police nature. Louisville & N. R. R. Co. *v.* Kentucky, 161 U. S. 677, 16 Sup. Ct. Rep. 714 (1896). But intimations that some or all of the justices have doubts as to whether charter provisions may inevitably be enforced under all future circumstances appear in Interstate Consolidated Street Railway Co. *v.* Massachusetts, 207 U. S. 79, 28 Sup. Ct. Rep. 26 (1907), International & G. N. Ry. Co. *v.* Anderson County, 246 U. S. 424, 38 Sup. Ct. Rep. 370 (1918), and Detroit United Ry. Co. *v.* Detroit, 39 Sup. Ct. Rep. 151 (1919).

[65] 188 U. S. 385, 23 Sup. Ct. Rep. 463 (1903).

the tax upon the franchise granted by it shall be measured by the value of all its property, wherever situated, of whatever nature, or from whatever source derived. It is a sufficient answer to this suggestion to say that no such condition was prescribed in the charter of the ferry company when it was granted and accepted. Nor does the taxing statute in question make it a condition of the ferry company's continuing to exercise its corporate powers that it shall pay a tax for its property having a *situs* in another State. There is no suggestion in the company's charter that the State would ever, in any form, tax its property having a *situs* in another State. We express no opinion as to the validity of such a condition if it had been inserted in the company's charter, or if it were now, in terms, prescribed by any statute. We decide nothing more than it is not competent for Kentucky, under the charter granted by it, and under the Constitution of the United States, to tax the franchise which its corporation, the ferry company, lawfully acquired from Indiana, and which franchise or incorporeal hereditament has its *situs*, for purposes of taxation, in Indiana." [66]

Owing to this disposition of the case, the court did not consider whether the tax complained of was an unlawful burden on interstate commerce.

Thus the court leaves open the question whether a state may tax domestic corporations as it pleases, provided it specifically bases its demand on its control over the continued existence of the corporation. This question was left open also by *Kansas City, M. & B. R. Co.* v. *Stiles*,[67] which was careful to adduce in support of an excise measured by total capital stock the fact that the law was in force when the corporation begged for birth.[68] The Supreme Court is still free to apply the doctrine of the Western Union case to domestic corporations which are not under some fairly clear contractual disability to object to the demand complained of. Whether it will do so is still uncertain. Whether it should do so is a question on which disagreement is not difficult. In the opinion of the writer, the less we have in our constitutional law of arbitrary power on the part of one state to deal as it will with affairs in other states, the better. If a tax is not constitutional by

[66] 188 U. S. 385, 23 Sup. Ct. Rep. 398 (1903).

[67] Note 64, *supra*.

[68] For example, the passage quoted in 31 Harv. L. Rev. 599: "The railroads comprising this consolidation entered upon it with the Alabama statute before them and under its conditions, and, subject to constitutional objections as to its enforcement, they cannot be heard to complain of the terms under which they voluntarily invoked and received the grant of corporate existence from the state of Alabama."

reason of its own intrinsic merit or absence of sufficient demerit, there is something artificial and unwholesome in making it constitutional by endowing a state with a club which it may brandish at will. A tax on the extra-state income of a domestic corporation, if not good as an exercise of the taxing power, does not, as an original proposition, present a strong claim for recognition as an exercise of unlimited power over corporate creatures. It no longer fits the facts to treat the grant of a corporate charter as a bestowal of gracious favor by an act of high prerogative. In most instances it is today a mere record of a situation that by common consent is one demanded by the exigencies of normal business intercourse.[69]

Even if it is held that a state is subject to limitations in wielding the taxing power by way of the amendment of corporate charters, there still remains the question whether a tax on the total net income of a domestic corporation can not stand on its own legs. New York,[70] Wisconsin,[71] Montana,[72] Connecticut [73] and West Virginia [74] ask domestic corporations to pay only on the income earned from business within the state, or on the proportion of total income roughly estimated to have been earned within the state. Montana, *ex abundantia cautelae* or inspired by benevolence, excludes income from interstate commerce. Missouri [75] and Virginia,[76] however, take toll from all income no matter whence derived. As the profits from local or interstate commerce in other states increase, the revenues of the chartering state wax correspondingly. A historian might be reminded of a famous tea party, but we are thinking of the Constitution that followed after. Should the fact that the recipient of extra-state income is a domestic corporation justify a tax on that income? If such income is

[69] For elaboration of this position, to which the writer acknowledges his indebtedness, see Gerard Carl Henderson, "The Position of Foreign Corporations in American Constitutional Law," 2 Harvard Studies in Jurisprudence, chap. X. While Mr. Henderson is dealing primarily with foreign corporations, his analysis, it is submitted, applies in considerable degree to domestic corporations as well.

[70] Laws of New York (1917), chap. 726, § 214. See note 91, *infra*, for reference to later amendment.

[71] See note 91, *infra*.

[72] Laws of Montana (1917), chap. 79.

[73] Acts of 1915, chap. 292; General Statutes of Connecticut (Revision of 1918), chap. 73, §§ 1391, 1394.

[74] Acts of West Virginia, Second Extraordinary Session, 1915, chap. 3.

[75] Laws of Missouri, 1917, 528. S. B. 415, § 7.

[76] 4 Virginia Code Annotated (Supplement, 1916), 552.

from interstate commerce, is a tax thereon a regulation of that commerce "in a constitutional sense"?

In considering the question, let us assume that an individual may be taxed at his domicil on all net income which comes to his coffers, for so the law is likely to be. It does not accord with traditional views of the law to declare that a state's power over artificial persons of its own creation is less than that over man that is born of woman. Nevertheless it is submitted that the Supreme Court would do well so to hold with respect to the matter now under consideration. A corporation does not send its children to school; it does not vote for governor; it does not make a will; it does not marry or give in marriage. It is a business mechanism, and nothing more. It is a medium by which income is made and distributed. In so far as the process is local to the taxing state, the fruits thereof should be taxed. But there are several reasons which justify taxing an individual on his total net gain at the place where he makes his permanent home, that do not apply to a similar tax on a corporation. The individual is the terminus of the income. The termini of corporate income are often individuals in other states. The assimilation of a corporation to a natural person may for many purposes be a convenient fancy, but it should not blind us to essential differences that ought for other purposes to be controlling. The crucial question is whether business, as business, should be taxed elsewhere than where it is carried on. It is agreed that it should be taxed there. If it is taxed elsewhere as well, the burden is cumulative. When the corporate income passes on to the individuals who are in reality the corporation, it may be taxed again. Granting that some double taxation is necessary, or even desirable, it is possible to have too much of it. No more feasible spot for elision of double taxation can be found than the extra-state income of a corporation. The majority of the states which have thus far imposed taxes on the net income of corporations have discovered this for themselves. While the constitutionality of such reaping where a state has not sown is still undetermined, the Supreme Court would do well to consider the problem in all of its practical bearings, and not follow blindly some metaphysical conceptions of the nature of the corporate entity and questionably broad declarations as to the power of a state over its mystical being.

It has already been recognized that natural persons stand in a different relation to the state of their choice than does a corporation. From domiciled individuals a state may with propriety exact tribute from all their gains. No serious question is likely to arise as to the taxation at the domicil of the recipient of income from intangibles which are relieved of other burdens. If the property is taxable to the owner on the principle of *mobilia sequuntur personam*,[77] the income therefrom should receive similar treatment. But income from extra-state realty and from extra-state business may conceivably stand on a different footing. A tax on the former is not likely to raise any question under the commerce clause, even when the recipient is engaged in interstate commerce. His interstate business is not less profitable because he gets less from other sources. The only complaint against a tax on income from extra-state realty would be based on the denial of due process of law. The argument would be that, as the source of the income is beyond the jurisdiction, the income is also. *Pollock* v. *Farmers' Loan & Trust Co.*[78] would naturally be relied on to support such a contention, but the issue in that case can be distinguished from that now under consideration. The source of income may determine whether a tax thereon is a direct or indirect tax within the meaning of the fourth clause of Article I, section 9, of the federal Constitution,[79] and still not determine whether there is state jurisdiction within the limitations of the Fourteenth Amendment. An expression of Mr. Justice Holmes in the latest case on the taxation of intangibles to their owner at his domicil has possibilities of application to the taxation of income:

"The present tax is a tax upon the person, as is shown by the form of the suit, and is imposed, it may be presumed, for the general advantages of living within the jurisdiction. These advantages, if the State

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[77] Kirtland *v.* Hotchkiss, 100 U. S. 491 (1879), is the leading case. See Charles E. Carpenter, "Jurisdiction over Debts for the Purpose of Administration, Garnishment, and Taxation," 31 HARV. L. REV. 905, for the most recent review of the authorities.

[78] 158 U. S. 601, 15 Sup. Ct. Rep. 912 (1895). This case held that a tax on the income from land is the same as a tax on the land itself from the standpoint of the question whether the tax is direct or indirect.

[79] "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken." This provision is modified, in so far as its application to taxes on income, by the Sixteenth Amendment.

so chooses, may be measured more or less by reference to the riches of the person taxed." [80]

To this is added:

"It is unnecessary to consider whether the distinction between a tax measured by certain property and a tax on that property could be invoked in a case like this. *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 146, 162 *et seq.* Whichever this tax technically may be, the authorities show that it must be sustained." [81]

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[80] Fidelity & Columbia Trust Co. *v.* Louisville, 245 U. S. 54, 58, 38 Sup. Ct. Rep. 40 (1917).

[81] *Ibid.*, 59. This passage was quoted by Chief Justice Rugg of the Massachusetts supreme court in Maguire *v.* Tax Commissioner, 230 Mass. 503, 510–11, 120 N. E. 162 (1918), which sustained the power of Massachusetts to tax income received by a Massachusetts *cestui* from a Pennsylvania trust. "That reasoning," said the Chief Justice, "appears to us to be equally applicable to the facts here disclosed. . . . It is of no consequence in this aspect whether the tax is levied on income in truth received by the resident taxpayer from intangible property held for his benefit by a trustee resident in a sister State or on intangible property owned by the taxpayer but all in fact kept by him in a sister State. There is not apparent to us any difference in principle between the two cases" (230 Mass. 503, 511).

It is interesting to note that the Massachusetts court calls the income tax a property tax and justifies it as such, and then adds further justification which seems to proceed on the notion that it is tax on the person rather than one on property. Evidently the nomenclature is not of controlling importance. Substantial considerations of public policy appear to be the basis on which the taxability of residents on income from extra-state sources is sustained. The pertinent paragraphs of the opinion are as follows: "The *cestui que trust* has important legal rights respecting the trust fund which are personal to her. They are rights in the nature of property. They cannot be taken away from her by arbitrary or irrational procedure. They attach to her person wherever she goes. One of these is the right to receive the income. That is a property right. The income when received is property. The tax here in question is a property tax. *Tax Commissioner* v. *Putnam*, 227 Mass. 522, 531, 532. Whether it be regarded as a tax on the right of the *cestui que trust* or a tax on the income as received, in either event a property tax is permissible. Of necessity a tax on income requires time as an element in its calculation. It must be levied on the income received during a period of time. It is not necessary that income be reinvested before it can be taxed. It may be spent as received and yet be subject to taxation. The contention of the petitioner in principle reaches much further than to the facts of the present case. In its logical application and extension it apparently would render invalid income from annuities, certificates in partnerships, associations and trusts, and perhaps other sources, originating in sister States, and not having a place of business in this Commonwealth. Of course, if the principle is sound, its disturbing effect is no argument against its recognition and adoption. But a contention which in its results would seriously cripple the practical operation of any comprehensive system of State income taxation has no presumption in its favor and ought not to be adopted except because of compelling considerations. We perceive no such requirement as to the tax here in controversy. Whatever may be the effect of *Pollock*

The Stone Tracy case sustained the federal corporation tax of 1909 and sanctioned the inclusion of income from municipal bonds and other securities not directly taxable by the federal government. The distinction between the subject and the measure of the tax was the magician's wand used to wave away crucial difficulties and avoid analysis of pertinent issues. Referring to *Galveston, H. & S. A. R. Co.* v. *Texas* [82] and *Western Union Telegraph Co.* v. *Kansas* [83] Mr. Justice Day declared authoritatively:

"There is nothing in these cases contrary, as we shall have occasion to see, to the former rulings of this court which hold that where a tax is lawfully imposed upon the exercise of privileges within the taxing power of the State or Nation, the measure of such tax may be the income from the property of the corporation, although a part of such income is derived from property in itself non-taxable. The distinction lies between the attempt to tax the property as such and to measure a legitimate tax upon the privileges involved in the use of such property." [84]

Whether this distinction survived the Western Union case in sound logic we need not pause to inquire. It is enough for our present purpose that it survived that case in the mind of the Supreme Court. It is still available as an ever-present help in time of logical trouble. It is quite as applicable to a state tax on the privilege of its citizens to be domiciled within the jurisdiction as to a federal tax on doing business in corporate form. If it seems wise to measure a personal income tax by all income, from whatever

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v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 581; s. c. 158 U. S. 601, and *Brushaber* v. *Union Pacific Railroad*, 240 U. S. 1, 16, 17, upon the nature of the tax here in question under the Constitution of the United States, no binding decision appears to us to require that this tax be declared invalid. There is nothing inconsistent with the conclusion here reached in *Walker* v. *Treasurer & Receiver General*, 221 Mass. 600.

"The income tax is measured by reference to the riches of the person taxed actually made available to him for valuable use during a given period. It establishes a basis of taxation directly proportioned to ability to bear the burden. It is founded upon the protection afforded to the recipient of the income by the government of the Commonwealth of his residence in his person, in his right to receive the income, and in his enjoyment of the income when in his possession. That government provides for him all the advantages of living in safety and in freedom and of being protected by law. It gives security to life, liberty, and the other privileges of dwelling in a civilized community. It exacts in return a contribution to the support of that government measured by and based upon the income, in the fruition of which it defends him from unjust interference" (*Ibid.* 512–13).

[82] 210 U. S. 217, 28 Sup. Ct. Rep. 638 (1908), 32 Harv. L. Rev. 385 *ff.*

[83] 216 U. S. 1, 30 Sup. Ct. Rep. 190 (1910), 31 Harv. L. Rev. 584 *ff.*

[84] 220 U. S. 107, 163–64, 31 Sup. Ct. Rep. 342 (1911).

source derived, the Supreme Court has at its right hand the necessary formula to support the exaction. If it seems unwise, the Western Union case and those following it are within easy reach of the left hand to find constitutional defects.

It is to be anticipated that the right hand will be chosen for dealing with income from extra-state realty. If the mortgagee of such realty may be taxed at his domicil on the obligation of the mortgagor,[85] it is hard to see why the owner should not make a contribution from his rent. A more serious question arises in respect to income from extra-state interstate commerce. Unless all signs fail, such income will be held taxable where the commerce is carried on.[86] Ought the same income from interstate commerce to be taxed by two states on different conceptions as to what is being taxed? It is too late to raise the general question whether bi-state double taxation should be allowed at all. The Supreme Court has not seen its way to declare that such double taxation is inconsistent with the Constitution.[87] But it has several times scotched double taxation of interstate commerce by a single state.[88] In these instances, however, the court was not dealing with taxation that fell on all business and all persons alike. It had before it the possibility or actuality of heavier burdens on interstate commerce than on other business. Where this possibility is foreclosed by general state taxation on all personal incomes received by citizens and on all business incomes from business within the territory, there is strong ground for the contention that interstate commerce should not be subsidized by exemption from burdens that other business must bear. Such a contention seems in substantial accord with the analysis of the results reviewed in this study.

Where power over the person is lacking, and an income tax must depend for its validity on power over the income itself, it is clear that extra-state income must be excluded from the computation.[89] Without doubt the Supreme Court will soon be called upon

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[85] Kirtland *v.* Hotchkiss, note 67, *supra*.

[86] See *supra*, pages 635–40.

[87] The cases are reviewed in Mr. Carpenter's article cited in note 77, *supra*.

[88] Fargo *v.* Michigan, 121 U. S. 230, 7 Sup. Ct. Rep. 857 (1887); Western Union Telegraph Co. *v.* Texas, 105 U. S. 460 (1881); Galveston, H. & S. A. Ry. Co. *v.* Texas, 210 U. S. 217, 28 Sup. Ct. Rep. 638 (1908), 32 HARV. L. REV. 385 *ff.*; Meyer *v.* Wells, Fargo & Co., 223 U. S. 298, 32 Sup. Ct. Rep. 218 (1912).

[89] This is the rule as to chattels, even when there is power over the owner. Union

to solve some pretty problems with respect to the so-called "situs" of income. Nonresidents and foreign corporations will seek support from the Fourteenth Amendment and the commerce clause for complaints that states have allocated to themselves more income than belongs to them. When all the transactions out of which the income arises are in a single state, the disputes will not present great difficulty. But when the income-producing activities straddle two states, and the acts in neither alone would yield the income, there is room for perplexity. The importance of the problem justifies a review of two cases which bear upon it, though neither touches it precisely, since in one the taxpayer was a domestic corporation, and in the other there was no element of interstate commerce.

The first case is the decision of the Wisconsin supreme court in

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Refrigerator Transit Co. *v.* Kentucky, 199 U. S. 194, 26 Sup. Ct. Rep. 36 (1905); Delaware, L. & W. R. R. Co. *v.* Pennsylvania, 198 U. S. 341, 25 Sup. Ct. Rep. 669 (1905). It is also the rule as to such an incorporeal hereditament as a franchise to run a ferry. Louisville & Jeffersonville Ferry Co. *v.* Kentucky, 188 U. S. 385, 23 Sup. Ct. Rep. 463 (1903). The opinion in the Union Refrigerator case says that it has always been understood that the rule is the same as to extra-state realty. In all of the cases sustaining the taxation of choses in action, there was either power over the creditor or over some economic value behind the chose in action, or over some incidents thereof.

The following excerpts from Mr. Justice Brown's opinion in the Union Refrigerator case are clearly applicable, *mutatis mutandis*, to income taxation:

"The power of taxation, indispensable to the existence of every civilized government, is exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his person and property, in adding to the value of such property, or in the creation and maintenance of public conveniences in which he shares. . . . If the taxing power be in no position to render these services, or otherwise to benefit the person or property taxed, and such property be wholly within the taxing power of another State, to which it may be said to owe an allegiance and to which it looks for protection, the taxation of such property within the domicil of the owner partakes rather of the nature of an extortion than a tax, and has been repeatedly held by this court to be beyond the power of the legislature and a taking of property without due process of law. . . .

"The argument against the taxability of land within the jurisdiction of another State applies with equal cogency to tangible personal property beyond the jurisdiction. It is not only beyond the sovereignty of the taxing State, but does not and cannot receive protection under its laws. True, a resident owner may receive an income from such property, but the same may be said of real estate within a foreign jurisdiction. Whatever be the rights of the State with respect to the taxation of such income, it is clearly beyond its power to tax the land from which the income is derived." 199 U. S. 194, 202–04.

There can be no doubt whatever that power over and protection of the recipient or the sources of income will be held essential to jurisdiction to levy an income tax.

United States Glue Co. v. *Oak Creek*[90] — the same controversy which presented the income-tax problem to the United States Supreme Court. The Wisconsin law aimed to tax no "business income" that was not earned within the state, whether received by residents or non-residents.[91] The United States Glue Company did not contest before the state court the taxability of its income from rentals and intangibles,[92] nor does the case state the sources from which such income was derived. The matter in controversy was the income from sales. With the contention that such income was not taxable because of the commerce clause, we are no

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[90] 161 Wis. 211, 153 N. W. 241 (1915).

[91] WISCONSIN STATUTES (1915), chap. 48 *a*, § 1087 *m*–2 (3). "With respect to other income, persons engaged in business within and without the state shall be taxed only upon such income as is derived from business transacted and property located within the state, which may be determined by an allocation and separate accounting for such income when made in form and manner prescribed by the tax commission, but otherwise shall be determined in the manner specified in subsection (*e*) of subsection 7 of section 1770 *b* of the statutes, as far as applicable." The section referred to prescribed a form of "unit rule," which applied the ratio between the sum of the gross business in dollars plus the value of the property in dollars within the state to an aggregate of the same two elements in all the states in which business was done.

New York has a somewhat more complicated rule of apportionment for its corporate income tax. In getting its ratio it takes account of the aggregate of the average monthly value of real property, chattels, bills and accounts receivable, and stocks of other corporations within the state and the aggregate of the same elements in all the states. LAWS OF NEW YORK, 1918, chap. 417, § 214 (vol. 2, 1262); BIRDSEYE'S CONSOLIDATED LAWS OF NEW YORK, 1918 Supplement, 661.

In the Wisconsin cases which have been found, the ratio method was not employed. In the Oak Creek case, specific consideration was given to the income from various sources. In State *ex rel.* Brenk *v.* Widule, 161 Wis. 396, 154 N. W. 696 (1915), an inheritance of foreign realty was held to be from sources without the state, and therefore the court did not decide whether it was "income" within the meaning of the statute. In State *ex rel.* Arpin *v.* Eberhardt, 158 Wis. 20, 147 N. W. 1016 (1914), income received by a resident from a partnership whose business and property was wholly without the state was held not taxable under the statute. In commenting on the statute, Judge Barnes said:

"Certain considerations occur to us which might have induced the legislature to refrain from taxing income derived from sources without the state except as specified. It was no doubt the desire of the legislature to prevent the loan or investment of moneys without the state for the purpose of receiving a fixed return for the investment made so as to avoid the payment of a tax on this species of property. The property of this firm was taxable in the state where located. If incomes were taxed in that state, the income would also, in all probability, be taxed there. If the income were taxed here, it might be doubly taxed. Conceding the right to impose such double taxation, the legislature might well feel that it would not be just to do so. Other considerations might be mentioned, but those suggested should suffice." 158 Wis. 20, 23–24.

[92] 161 Wis. 211, 215 (1915).

longer concerned. Our present interest is in the objection that the income from some of these sales was not derived from business transacted and property located within the state, and so not within the terms of the Wisconsin statute.

The income covered by these objections included (1) that from goods sold and delivered from the Wisconsin factory to persons outside the state; (2) that from products of the Wisconsin factory shipped to extra-state branch houses and from there sold to customers outside Wisconsin; and (3) that from goods bought without the state, shipped to extra-state branches either directly or by way of the Wisconsin factory, and then sold and delivered from the extra-state branches to extra-state customers.[93] As to this last class of business the Wisconsin court held that the income therefrom was not from business or property within Wisconsin. But Wisconsin was declared to be the source of all income from sales of products of the Wisconsin factory including those of goods disposed of from the branch houses in other states. After saying that "the place of sale of such products does not change the place of business from this to the state where the goods are sold," [94] Judge Siebecker continued:

"The transactions involved in producing the products at the plant at Carrollville and disposing of them through intra-state or interstate transactions are in substance and effect transacting business in this state, and the shipping and delivery of such goods on sales made at home or abroad, from either the factory or branch houses to which they had been shipped before sale, are no more than incidents in transacting the business of supplying the articles to customers in their finished state. We cannot, in the light of the nature of the general conduct of the business, assent to the claim that the shipping and delivery of goods, manufactured at the plant, from branch houses are the controlling elements of such transactions and that they give such business a situs without the state. The manufacture, the management, and the conduct of the business at the home office are the controlling features in the process of disposing of the article produced at the factory and constitute the source out of which the income issues and give it a situs within the state under the Income Tax Law." [95]

This view of the "situs" of income invites examination. If the professed basis of the Wisconsin tax on business income is not

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[93] 161 Wis. 213–14, 153 N. W. 241 (1915).

[94] *Ibid.*, 218.

[95] *Ibid.*

the subjection of the recipient to the power of Wisconsin, but the actual earning of the income in Wisconsin, Judge Siebecker dismisses too cavalierly the alleged importance of the transactions without the state. The sales in another state to customers in that state are taxable in that jurisdiction as intra-state sales.[96] If the United States Glue Company is a wholesaler in Chicago as well as a manufacturer at Carrollville, Wisconsin, it must be subject to an Illinois income tax on all its Illinois business, unless the Supreme Court is going to insist that power over the person is the only basis on which income taxes may be levied. Even such insistence would not forbid Illinois taxation of Illinois intra-state sales. And if income from interstate commerce carried on by non-residents or by foreign corporations may be included in a state-wide tax on business income, Illinois may lay a tax on income from sales by Illinois wholesalers to customers in other states, even though the sales are of goods manufactured by the wholesaler at a Wisconsin factory. Plainly enough the manufacture, the wholesale establishment and the work of securing customers and of collecting bills are all essential to the making of a profit. No one of these three elements in the combined enterprise is a mere incident. A portion of the net income is due to each element. If sufficiently exquisite book-keeping were possible, each state should take only that portion of the income which is contributed by the acts done within its own borders. Judge Siebecker considers only two extreme alternatives, both of which miss the ideal solution.

It may well be that the ideal solution is not attainable in practice. But this is no reason why it should be neglected in considering what is the best approximation that is feasible. Though manufacturing is for profit, the profit appears only in income from sales. The price which the product brings depends only in part on the excellence of raw materials and of shop management. The need or susceptibility of customers, the skill of the sales force, the wisdom in extending credit and energy in collecting accounts are not mere incidents, as Judge Siebecker would have us believe.[97] Indeed they may in many instances be "controlling" in the

[96] Ratterman *v.* Western Union Telegraph Co., 127 U. S. 411, 8 Sup. Ct. Rep. 1127 (1888).

[97] Judge Siebecker recognizes that these elements are of practical importance (161 Wis. 211, 217), but calls them but "incidents" from a legal standpoint.

sense that they are the factors that make the difference between profit and loss. These factors in interstate sales all occur outside the state of manufacture. The manufacture without the customer would be as vain as the customer without the goods to sell him. The state where the solicitation is done and where accounts must be collected offers to the business the protection of its police officials and its courts. If net income from interstate commerce is no longer to be exempt from state taxation, and if each state where income is earned is to be allowed to levy on that income irrespective of the domicil or legal character of the recipient, it is artificial to insist that either the manufacture or the securing of a customer is a mere "incident" or that either is "controlling," if controlling means of exclusive importance. Judge Siebecker's insistence that the extra-Wisconsin activities of the United States Glue Company were not entitled to legal consideration would have been more compelling if it had been based on the power of Wisconsin over its own corporate creatures. This ground, however, was not open to him under the Wisconsin statute. It does not appear to have been urged before the Supreme Court that the interpretation put upon the statute as to "situs" of the income in question raised an issue under the commerce clause. The Supreme Court might refuse to consider such a question in a case where state power over the recipient of income furnished sufficient justification for the result sanctioned by the state court. But it may be expected that other disputes will bring before the Supreme Court some important constitutional issues over the situs of income.

Another phase of this same problem appears in *Shaffer* v. *Howard*,[98] decided by the federal district court for the Eastern District of Oklahoma. The case involved the application of the Oklahoma income tax to the income of non-residents. Mr. Shaffer was domiciled in Chicago and owned and operated oil wells in Oklahoma. He contended that none of the income from these wells was taxable by Oklahoma, because the state had no power over him personally, and the income was "made up from two inseparable elements — the property and the owner's management and intelligence — and the latter of these is outside the state."[99] To this, Judge Cotteral answered:

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[98] 250 Fed. 873 (1918).

[99] 250 Fed. 873, 874 (1918).

"The element of personal ability or services in acquiring the income may be disregarded. It enters into all income and causes the returns from an occupation. But it has not been deemed important in the taxation of property, and need not be deducted from an assessment." [100]

Judge Stone considered the contention more at length. He concedes *arguendo* the contention of the complainant that "it is the recipient of the income that is taxed, not his property,"[101] and answers it by saying:

"It does not necessarily follow from this definition that the plaintiff is subject to income tax only in the state of his residence. It means, rather, that he is subject to income taxation only in those jurisdictions which protect him in the production, creation, receipt, and enjoyment of his income. If he lives in Illinois, and has in Oklahoma the property or the business from which his income flows, does not the latter state truly protect him in the privilege of producing, creating, receiving, and enjoying that income when it permits and protects his business from which the income flows? How is that affected by his residence?" [102]

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[100] 250 Fed. 883 (1918).

[101] 250 Fed. 873, 875 (1918). This statement of the complainant's contention is taken from a quotation in his brief from State *ex rel.* Sallie F. Moon Co. *v.* Wisconsin Tax Commission, 166 Wis. 287, 163 N. W. 639 (1917). Judge Campbell, in his dissenting opinion in Shaffer *v.* Howard, relies on this statement of the Wisconsin court and on another from the same tribunal in Manitowoc Gas Co. *v.* Wisconsin Tax Commission, 161 Wis. 111, 152 N. W. 848 (1915).

The Moon case held that income received by a resident stockholder after the effective date of the income tax law was taxable, although its economic source was a surplus in the hands of the corporation prior to that date.

The Manitowoc Gas case held that interest due a non-resident on bonds issued by a domestic corporation was not income "derived from sources within this state" within the meaning of the Wisconsin statute, since "the law levying an income tax upon nonresidents 'upon such income as is derived from sources within the state or within its jurisdiction' must be construed to mean such income as issues directly from property or business located within the state, and not income from loans made therein, though, as here, secured by a trust deed upon property situated within the state" (161 Wis. 111, 115). The inapplicability of the analysis of the Wisconsin tax in this opinion to the problem involved in Shaffer *v.* Howard is evident from an earlier statement of the Wisconsin court in the same case, which reads as follows: "If an income be taxed, the recipient thereof must have a domicile within the state or the property or business out of which the income issues must be situated within the state so that the income may be said to have a situs therein" (161 Wis. 111, 114–15). This deprives the contention of Mr. Shaffer against the Oklahoma tax of any support from the Wisconsin court's interpretation of the basis of the Wisconsin tax. That tax was partly on persons, and partly on income, irrespective of the recipient.

[102] 250 Fed. 873, 875–76 (1918).

In further elaboration of the problem of bi-state income, the learned judge continues:

"Both the property in Oklahoma and the intelligence in Illinois contributed to this income. Each was necessary to the result. Each had protection from the state in which it was. It is impossible to separate the two elements for taxation purposes. It is impossible, if material, to determine which was most potent in the result. Can either state be told it cannot be compensated for its protection of a necessary component element of this income, or that it cannot measure such compensation by that income? If, through accident or design, an individual dwells in one state, while his business is in part or wholly located in other states, so that he needs, commands, and receives the protection of several states, can his income therefrom escape imposition? It may be true that the state which protects the person of the one who creates, receives or enjoys an income may require of him therefor a tax measured by his ability to pay from his entire income. That is no reason why the state which protects the business which contributes to his income may not also demand, as pay for that protection, a tax measured by that part of his income which came from that business. If in the one case the state of residence can tax the right to create, receive, and enjoy an income, why cannot another state tax his right to create and receive an income from business within its borders?" [103]

This seems to be said by way of answer to the complainant's argument rather than as the analysis put upon an income tax by the writer of the opinion. For Judge Stone follows it with the paragraph:

"A tax upon an income of the instant character (from a business) is directed at neither the person who receives nor the property from which the income arises, but at the privilege of making, producing, creating, receiving, and enjoying the income itself. The right to lay such tax depends upon the protection of the person who receives or of the business which helps create that income." [104]

Here seems to be a dual conception of an income tax, though the writer insists that even upon the complainant's conception that the tax is on the recipient, there is jurisdiction over an absent recipient based on the protection of interests of the recipient even if these interests be not those of his body or his castle. It is pointed out that the statute does not seek to create a personal liability

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[103] 250 Fed. 876 (1918). [104] *Ibid.*

against non-residents for the payment of the tax, but confines itself to creating a lien on the sources of the income taxed. But, to Judge Stone, direct power of compulsion over the person is not a prerequisite to the levy of a personal tax, provided other essentials are present. On this point he says:

"There is nothing new in this conception of a nonresident being taxed for rights or privileges he exercises under the protection of another state. Inheritance taxes are illustrations. *Mager* v. *Grima*, 8 How. 490, 12 L. Ed. 1168; *Scholey* v. *Rew*, 23 Wall. 331, 23 L. Ed. 99. Such a tax is levied against the nonresident as well as the resident because of his inheritance — the state protects him in that privilege. Occupation or business taxes are also illustrative. And this would be so because the state of Oklahoma permits him to carry on his business within the state, and protects him therein, irrespective of whether he lives within or without the state, or manages the business from within or without the state. When he can be properly taxed for the privilege of inheriting the property or carrying on a business within another state, why cannot he be taxed upon an income he derives from business within the state, when a tax upon such an income as this is a levy on the privilege of producing, creating, receiving and enjoying an income? It is true the tax on the income is not upon the business conducted, but it is also true that the income springs therefrom, and, following the situs thereof, as the child takes legally the residence of the parent, it carries the right of taxation with it." [105]

This says that a person is something more than a physical corpus. From the standpoint of legal relations, a person is the focus of many interests, and the person is *pro tanto* where any one of his interests is. It is with relations that the law has to deal, and the relations of a person may radiate to portions of the globe which his body never visits. Such a notion may be criticized as metaphysical, but it is not on that account an anomaly in the law. And, though metaphysical, it may well contain more of substantial realism than a view which sees in a person nothing but what is encased in a suit of clothes. Judge Stone does not rest with this justification for the assessment of income taxes on nonresidents. He uses it to meet Mr. Shaffer on his own ground, and then advances to another position. His analysis of the considerations that should control the legal concept of situs is well worth quoting:

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[105] 250 Fed. 876–77 (1918).

"Such an income of a nonresident is taxable not only because it fits in with the theory of the right of all taxation, *i. e.*, protection, but for another reason. The situs of things and choses in action and legal rights rests in many cases upon a legal fiction. The necessity of avoiding confusion, inconvenience or injustice arises in some instance, and the law settles upon a so-called situs. Familiar illustrations are: A married woman ordinarily partakes of her husband's nationality and domicile; the law of domicile controls the descent of personalty; and many others to be found in the realm of private international law. These questions arise where there are conflicting claims of jurisdiction. Their settlement depends often, if not usually, upon broad considerations of public policy and justice. One main test in determining the public policy and justice of a situation is to examine the possible or probable effect of a particular holding. If the above view of this tax taken by the court does not prevail, there will result the possibility of avoidance of state income taxes. This latter through the possibility of taking up residence in a state with little or no taxation of that sort. Income taxation is too valuable and important a method of exercising the sovereign power of taxation to risk any diminution through a choice of residence at the hands of the party taxed who at the same time maintains his property and business as before. The public good requires its preservation in its entirety." [106]

There can be little doubt that one or the other or both of these views of Judge Stone will prevail to the extent of furnishing sufficient justification for state taxation of income from business within its borders, irrespective of the domicil or character of the ultimate recipient of that income.[107] It is most unlikely that any non-

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[106] 250 Fed. 877 (1918).

[107] This prophecy is ventured, notwithstanding the dissent of Judge Campbell in Shaffer *v.* Howard. Judge Campbell relies on the following statement of Mr. Justice Field in State Tax on Foreign-Held Bonds, 15 Wall. (82 U. S.) 300, 319 (1872):

"The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State. These subjects are persons, property, and business. Whatever form taxation may assume, whether as duties, imposts, excises, or licenses, it must relate to one of these subjects. It is not possible to conceive of any other, though as applied to them, the taxation may be exercised in a great variety of ways."

On this as a premise, Judge Campbell insists that the Oklahoma income tax on residents is a tax on persons, and the tax on non-residents is either on persons, property or business. As a personal tax it cannot be sustained because there is no jurisdiction over the person of non-residents. As a tax on business or on property, it cannot be sustained because it selects for discrimination the property or the business of non-residents and thereby denies them the equal protection of the laws and the privileges and immunities of citizens of the several states.

resident will be given any deduction for the contribution of his intelligence to the creation of the income taxed. His intelligence is a factor only as it is applied, and it is applied where the business operations take place. Yet there still remains the inquiry whether extra-state operations should not, whenever feasible, be given weight in determining what portion of the result of bi-state activi-

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The weakness of the argument here is in the assertion that for the purpose of determining the validity of a tax on the property or business of nonresidents, "it must be considered as standing alone" (250 Fed. 873, 889). This is to say that it cannot be considered that residents are also taxed on their property and business within the state, when they are taxed on their income from that property and business and on other income besides. The argument is a flagrant example of the evil of reliance on differences in nomenclature to the disregard of similarity of substance.

Whether a state should tax nonresidents on other income than that from business within its borders is open to doubt. The economic values behind income from rentals, from interest on bonds and from dividends on stock are within the state and are taxable by the state through appropriate methods. As to land within the borders there has never been any question. As to bonds secured by property within the state, State Tax on Foreign-Held Bonds, *supra*, on which Judge Campbell relied, must be regarded as modified by Savings & Loan Society *v.* Multnomah County, note 109, *infra*, to the extent of permitting a state to declare that such bonds are an interest in the property by which they are secured and taxable as such an interest. So the stock of domestic corporations owned by nonresidents may be taxed. Corry *v.* Baltimore, 196 U. S. 466, 25 Sup. Ct. Rep. 297 (1905). On the other hand ordinary debts due from residents to nonresidents are not taxable except when there are special circumstances, as in Metropolitan Life Insurance Co. *v.* New Orleans, 205 U. S. 395, 27 Sup. Ct. Rep. 499 (1907), and cases therein cited.

In so far as a state tax on income is in lieu of actual or possible taxes on the sources of such income, there would seem to be no constitutional objection to a tax on income derived by nonresidents from such sources. When, however, such a tax on the income of nonresidents is in addition to taxes on the sources of such income, or is on income from non-taxable sources, a different question is presented. The Manitowoc Gas case, note 101, *supra*, shows the disinclination of the Wisconsin court to permit the taxation of income due nonresidents from bonds issued by a domestic corporation. The decision professes to be based on an interpretation of the statute, but the construction is strained, and the decision is plainly influenced by a notion that an interpretation permitting such taxation would make the statute unconstitutional. There can be little dispute that a state ought not to tax nonresidents on both the income and the sources of income or on income from non-taxable sources, with the possible exception of the case where the combined tax on the source and on the income is not greater than customary taxation on the source alone. Whether the considerations which should induce self-restraint on the part of the state are sufficiently compelling to warrant coercion on the part of the Supreme Court is more debatable, but in view of the fact that all income is likely to be held taxable to an owner at his domicil, there seems good reason to insist that other states from which such income is derived should be restrained from adding more than one additional tax. We cannot hope to avoid double taxation by the action of different states, but so far as practicable the line should be drawn at this point.

ties should be allocated to each of the two states. It does not seem wholly equitable that, when goods are manufactured in one state and sold in another, the state of origin should receive all the benefit and the state of destination none. Once it is recognized that net income from interstate commerce is a proper subject of state taxation, lawmakers should strive to devise some method of apportionment whereby income that is earned partly in one state and partly in another shall be fairly divided between the two.[108] Those who enjoy a market place other than the state of their domicil or of their manufacturing may reasonably be required to contribute to the governmental expenses of that market place, for some of those expenses are likely to redound to their benefit.

These considerations are doubtless more pertinent for legislators than for courts. Neither the Fourteenth Amendment nor the commerce clause prescribes a perfect system of taxation. No such system has thus far been evolved by the ingenuity of man. The courts can at best forbid only the most obvious inequities. Whatever rules of the apportionment of bi-state income may ultimately be sanctioned by the Supreme Court will operate in some particulars to the advantage of the state which suffers from their other effects. Each state is a state of origin of goods sold to its neighbors and a state of consumption of goods made by its neighbors. If Illinois is not allowed to get any of the proceeds of goods sold to her citizens from a factory in Wisconsin, she will be recompensed by not having to make deductions from the proceeds of goods sent from her factories to dwellers in Wisconsin. We can hardly look forward to an era when double taxation shall cease to be. The same hydra-headed conceptions which have permitted the economic value represented by intangibles to be reached by one state on one theory and by another state on another theory[109] will be likely to produce the same results in the taxation of income. The most we can aim for is the most satisfactory compromise and adjustment possible in a mundane world peopled and managed by finite individuals.

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[108] The various types of unit rule will tend to make such an apportionment when the business in the several states is manufacture and sales and each state in which business is done is a market place for goods from other states and a place of origin for goods sent to other states.

[109] Compare Kirtland *v.* Hotchkiss, note 77, *supra*, with Savings & Loan Society *v.* Multnomah County, 169 U. S. 421, 18 Sup. Ct. Rep. 392 (1898).

An important step in this adjustment has been taken by a committee of the National Tax Association, of which Professor Bullock of Harvard University is chairman. This committee has drafted a plan of a model system of state and local taxation[110] which, if adopted by all the states, would go far towards remedying many of the evils now incident to the haphazard and contradictory tax systems of the sister states. The recommendations concern us here only in so far as they apply to income taxation. In brief the proposal is to divide income taxation sharply into a personal income tax and a business tax. In the taxation of personal incomes, the source of the income is to be neglected except when the federal Constitution forbids, as it probably still does in the case of income from the national government.[111] In addition to the personal income tax, there shall be a business tax on the net income derived from business carried on within the jurisdiction. Extra-state income will thus be taxed only to the ultimate human recipient at his domicil. Business income, as such, will be taxed only where the income is earned. The business tax is to be in lieu of the various other demands now made on corporations by way of excises, franchise taxes and the like. For special reasons some other method of fixing the amount of the business tax may be substituted for the reference to the net income.

These proposals, it is evident, will not do away with double taxation; but they will greatly minimize its inequities and other evils. There must continue to be two conceptions underlying an income tax: the earning of the income, and the enjoyment of the fruits thereof; the business, and the person. These two conceptions must be driven together in harness and under harmonious, if not unified, control. Only by securing the adoption of substantially similar plans by all the states to which the business of the nation penetrates can we avoid the complexities and diversities which now beset us. The Supreme Court can only fix the outside limits of decency. Within those limits there is need for all the intelligence that the states can muster to substitute a reasonable degree of

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[110] Pamphlet issued by National Tax Association, 195 Broadway, New York City. The pamphlet will be contained in the PROCEEDINGS of the Association for 1918.

[111] In the next and concluding instalment of this series, consideration will be given to the inferences to be drawn from the opinion of Mr. Justice Pitney in the Oak Creek case, note 2, *supra*, as to the possibility of an abandonment of the doctrine that a state income tax cannot include the income from the federal government.

harmony for the chaos that is now characteristic of the aggregate of the fiscal systems of the several states.

III. *Taxes Not Measured by Income*

In his dissenting opinion in *Western Union Telegraph Co.* v. *Kansas*,[112] Mr. Justice Holmes remarked:

"If after this decision, the State of Kansas, without giving any reason, sees fit simply to prohibit the Western Union Telegraph Company from doing any more local business there or from doing local business until it has paid $20,100, I shall be curious to see upon what ground that legislation will be assailed." [113]

This curiosity cannot be said to have been completely satisfied by any of the decisions rendered thus far. In no case has a specific tax on local business been held to be a regulation of interstate commerce or a denial of due process of law. Yet, on the whole, the cases appear to negative the existence of an unlimited power to impose specific taxes on the local business of a concern that is also engaged in interstate commerce.

There are, indeed, intimations to the contrary in the decisions prior to the Western Union case. In *Postal Telegraph Cable Co.* v. *Charleston*,[114] which sustained a municipal tax of $500 on the local business of a telegraph company, Mr. Justice Shiras declared:

"If business done wholly within a State is within the taxing power of the State, the courts of the United States cannot review or correct the action of the State in the exercise of that power." [115]

In *Osborne* v. *Florida*,[116] which sanctioned a state statute imposing occupation taxes graded according to the number of inhabitants in the cities and towns in which the occupation was carried on, which statute the state court had construed as applicable only to local business, Mr. Justice Peckham observed:

"So long as the regulation as to the license or taxation does not refer to and is not imposed upon the business of the company which is interstate, there is no interference with that commerce by the state statute." [117]

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[112] 216 U. S. 1, 30 Sup. Ct. Rep. 190 (1910).

[113] *Ibid.*, 54–55.

[114] 153 U. S. 692, 14 Sup. Ct. Rep. 1094 (1894).

[115] *Ibid.*, 699–700.

[116] 164 U. S. 650, 17 Sup. Ct. Rep. 214 (1897).

[117] *Ibid.*, 655.

Pullman Co. v. *Adams*[118] and *Allen* v. *Pullman's Palace Car Co.*[119] have already been reviewed in the section dealing with taxes on privileges.[120] The judges here appeared to be of the opinion that no tax on the local business could be a burden on the interstate business so long as the company was free to abandon the local business. These two cases were strongly relied on by the dissent in the Western Union case. Mr. Justice Harlan distinguished them on the ground that they involved no device to reach interstate commerce or property beyond the state in the guise of a tax on local business,[121] thereby implying that such a device would henceforth receive the disapprobation of the court.

Two other cases prior to the Western Union case call for consideration. *Kehrer* v. *Stewart*[122] approved of a state statute "which provided that there should be assessed and collected 'upon all agents of packing houses doing business in this State, two hundred dollars in each county where said business is carried on.'"[123] The State court had construed the statute to be applicable only to local business. It was conceded that most of the business was interstate in character, though the exact proportion of each was not shown. In *Osborne* v. *Florida*,[124] ninety-five percent of the business was interstate. This fact is referred to by Mr. Justice Brown in the Kehrer case and declared to be immaterial. The attitude of the court on the general question is expressed as follows:

"If the amount of the domestic business were purely nominal, as, for instance, if the consignee of a shipment made in Chicago upon an order filled there, refused the goods shipped, and the only way of disposing of them was by sales at Atlanta, this might be held to be strictly incidental to an interstate business, and in reality a part of it, as we held in *Crutcher* v. *Kentucky*, 141 U. S. 47; but if the agent carried on a definite, though a minor, part of his business in the State by sales of meat there, he would not escape the payment of the tax, since the greater or less magnitude of the business cuts no figure in the imposition of the tax. There could be no doubt whatever that, if the agent carried on his interstate and domestic business in two distinct establishments, one would be subject

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118 189 U. S. 420, 23 Sup. Ct. Rep. 494 (1903).

119 191 U. S. 171, 24 Sup. Ct. Rep. 39 (1903).

120 31 Harv. L. Rev. 582–83. See also 32 Harv. L. Rev. 405–06.

121 31 Harv. L. Rev. 592–93.

122 197 U. S. 60, 25 Sup. Ct. Rep. 403 (1905).

123 *Ibid.*, 61.

124 Note 116, *supra*.

and the other would not be subject to the tax, and in our view it makes no difference that the two branches of the business are carried on in the same establishment. The burden of proof was clearly upon the plaintiff to show that the domestic business was a mere incident to the interstate business." [125]

Later, in dismissing objections urged under the equal-protection clause, Mr. Justice Brown declared:

"What the necessity is for such a tax, and upon what occupations it shall be imposed, as well as the amount of the imposition, are exclusively within the control of the State legislature. So long as there is no discrimination against citizens of other States, the amount and necessity of the tax are not open to criticism here." [126]

The Kehrer case was followed in *Armour Packing Co.* v. *Lacy*,[127] in which the tax was $100 in each county and the fact appeared that the company did a large local business.

These cases undoubtedly justify the curiosity betrayed by Mr. Justice Holmes in his Western Union dissent. The opportunity to satisfy that curiosity was presented to the Supreme Court in *Williams* v. *Talladega*,[128] but it was not grasped. A city ordinance imposing a tax of $100 was held void because it fell indiscriminately on all intra-state business including that done for the federal government. With respect to the contention material to our present purpose, Mr. Justice Day declared:

"It is further contended that the tax is unreasonable and unjust because of its effect upon interstate business. The reasonableness of the ordinance, unless some Federal right set up and claimed is violated, is a matter for the State to determine. It is contended that the result of the tax upon the intra-state business conducted at a loss is to impose a burden upon the other business of the company, and is therefore void. The Supreme Court of Alabama, however, reached the conclusion that the attempted test for eleven months, showing a loss of eighty-six cents, is not a sufficiently accurate representation of the business of the company conducted at Talladega to render the tax void. With this view we agree, and we are not satisfied that the tax is such as to impose a burden upon interstate commerce, and therefore make it subject to attack as a denial of Federal right." [129]

[125] 197 U. S. 60, 69, 25 Sup. Ct. Rep. 403 (1905).

[126] *Ibid.*, 70.

[127] 200 U. S. 226, 26 Sup. Ct. Rep. 232 (1906).

[128] 226 U. S. 404, 33 Sup. Ct. Rep. 116 (1912).

[129] *Ibid.*, 416–17.

Here is the possible implication that a tax on local business may be so large or so disproportionate to the business taxed as to be regarded as a device for reaching the interstate business. At any rate, the court had a chance to declare that the tax could not be a regulation of interstate commerce, whatever the facts might be as to the profitability of local business. By failing to do so, it invites other complainants to try again if they have a stronger case to support their claim. A similar invitation was extended in *Ohio Tax Cases*[130] considered in the preceding instalment of this discussion.[131]

The case which gives sufficient warrant for the belief that there is a limit to the power of the state to impose specific taxes on local business, when that business is united with an interstate business, is *General Railway Signal Co.* v. *Virginia*[132] decided in April a year ago. This case involved a writ of error from the Virginia decision considered in a previous section of this study.[133] The prophecy was there ventured that the Virginia decision would be reversed by the Supreme Court. This prophecy was founded on the assumption that the Virginia excise on foreign corporations was measured by total capital stock with no maximum limitation, since nothing to the contrary appeared in the opinion of the Virginia court. The assumption, however, was contrary to fact, as corporations having a capital of $90,000,000 or more paid only $5,000. Moreover, the amounts exacted of smaller corporations did not vary precisely with capital stock, except when the capital was between $50,000 and $1,000,000. One thousand dollars was demanded from every corporation with a capital between one and ten million dollars, $1,250 from those whose capital is between ten and twenty million, with corresponding increases of $250 for those in the higher classes. Thus the statute was like the hypothetical one suggested previously in this study,[134] in which, instead of a single maximum, there was a series of maxima graded roughly according to capital stock. In discussing such a statute, it was argued that if Massachusetts made its exaction proper by a $2,000 maximum which was of value only to corporations with a capital in excess of $10,000,000,

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[130] 232 U. S. 576, 34 Sup. Ct. Rep. 372 (1914).

[131] 32 Harv. L. Rev. 405–07.

[132] 246 U. S. 500, 38 Sup. Ct. Rep. 360 (1918).

[133] General Railway Signal Co. *v.* Commonwealth, 118 Va. 301, 87 S. E. 598 (1916), 31 Harv. L. Rev. 756–60.

it would not transgress by adding lower maxima for smaller corporations.[135] A statute with a maximum, it was urged, should be regarded as one imposing a specific tax, with a sliding discount in favor of corporations whose moderate capitalization entitled them to it.[136]

This is in substance the Virginia statute. It imposes a specific $5,000 fee and allows corporations having less than $90,000,000 a deduction measured not precisely, but roughly, according to the amount by which their capital is less than $90,000,000. Mr. Justice McReynolds appears to conceive it important that Virginia put the corporations into ten-million-dollar groups and did not vary the tax directly according to the capital, but it is hard to see how this is significant where there are fixed maxima. Moreover this does not describe the method of measuring the tax on corporations whose capital was between $50,000 and $1,000,000. The statute could hardly have been more palatable if all such corporations were charged the same amount, instead of a percentage of their actual capital. What is important is that there shall be a fair limit to any tax that may be imposed. It is apparent that the maximum or maxima must be reasonable, or the situation comes within the Western Union case rather than the Baltic Mining case.

Such is clearly the position taken by the court in *General Railway Signal Co.* v. *Virginia*.[137] The approval of the Virginia decision was accorded gingerly, Mr. Justice McReynolds saying:

"Inspection of the statute shows that prescribed fees do not vary in direct proportion to capital stock, and that a maximum is fixed. In the class to which plaintiff in error belongs the amount specified is one thousand dollars and, under all the circumstances, we cannot say that this is wholly arbitrary or unreasonable.

"Considering what we said in *Baltic Mining Co.* v. *Massachusetts*, 231 U. S. 68; *St. Louis Southwestern Ry. Co.* v. *Arkansas*, 235 U. S. 350; *Kansas City, Ft. Scott & Memphis Ry. Co.* v. *Botkin*, 240 U. S. 227; *Kansas City, Memphis & Birmingham R. R. Co.* v. *Stiles*, 242 U. S. 111, the two characteristics of the statute just referred to must be regarded as sufficient to save its validity. It seems proper, however, to add that the case is on the border line. See *Looney* v. *Crane Co.*, 245 U. S. 178;

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[134] 31 Harv. L. Rev. 738–39.

[135] *Ibid.*

[136] 31 Harv. L. Rev. 777, 941–42.

[137] Note 132, *supra.*

International Paper Co. v. *Massachusetts*, 246 U. S. 135, and *Locomobile Co.* v. *Massachusetts*, 246 U. S. 146." [138]

Among the circumstances thus taken into consideration and previously detailed in the opinion was the fact that the company's contracts in Virginia called for a total consideration in excess of $200,000. The caution that the case is on the border line and the mild approval of the tax as not wholly arbitrary or unreasonable show clearly that a maximum limit or series of limits to an excise measured or roughly graded in accordance with capital stock does not save the statute from sin unless the maximum is reasonable. Curiosity may still be piqued to discover what will be the test or tests of reasonableness, but we may now be satisfied that a flat charge on the local business of a company that also conducts interstate business is not immune from condemnation as a regulation of interstate commerce and a denial of due process of law. If this is true of an excise on the local business of a foreign corporation, it must also be true of specific taxes on acts or occupations, where we are relieved from any intrusion of the notion of an arbitrary power over the doings of a corporate entity.

There remains for consideration only the question of the proper test of reasonableness. *St. Louis, Southwestern R. Co.* v. *Arkansas* [139] declares that the basis of an excise on a foreign corporation engaged in combined local and interstate commerce may be that proportion of the total capital stock which represents the value of the property within the taxing district, though such property is used in interstate as well as local commerce. This excise measured by the property within the state was in addition to an ordinary property tax, but it appeared that the right to do business as a corporation was not included in the assessment of that ordinary property tax. Mr. Justice Pitney's opinion is flavored with the notion that this excise and the so-called ordinary property tax together did no more than to assess the total property at its value as a going concern, but it is not definitely stated that the propriety of measuring an excise on local business by the total property in the state is conditioned on the mode by which that property is assessed for ordinary taxation. It seems reasonable to assume that, in the

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[138] 246 U. S. 500, 511, 38 Sup. Ct. Rep. 360 (1918).
[139] 235 U. S. 350, 35 Sup. Ct. Rep. 99 (1914).

absence of special circumstances, an excise or occupation tax on a local business may be based on all the property used in that business even though that property is also used in interstate business and is also subjected to an *ad valorem* property tax.[140] But it may readily be conceived that special circumstances may make such a measure of an excise or occupation tax a very real burden on interstate commerce. It is apparent that when such taxes are imposed on specially selected enterprises, they may in fact constitute serious discriminations against interstate commerce. All the property may be used for local as well as interstate commerce and yet the latter constitute by far the greater part of the total business. If a state is allowed free range in prescribing the rate of levy on such a property base, it may do quite as serious an injury to interstate commerce as it could inflict by basing the tax on total capital stock. Though the court may as a general rule accept property employed in local business as the proper measure of an occupation tax on that business, it must always have at hand its doctrine that every case depends on its own circumstances and must be ready to find the special circumstances that take the case out of the general rule.

It must be impossible to lay down any general rule as to what is a proper amount to impose as a specific tax on a local business that is combined with an interstate business. All that can be said is that by and large the punishment must fit the crime. One thousand dollars may not have been too much for Virginia to demand of the Railway Signal Company in view of its contracts within the state. Yet the same sum based on the same capital stock might prevent it from bidding on small contracts within the state. Where the performance of the contract calls for interstate as well as local enterprise, a fee out of all proportion to the consideration for the contract may stand as an absolute bar to the particular interstate commerce. This is the vice of all occupation or business taxes that are not measured by the value of what is being taxed. The vice is particularly noxious in the case of corporations not regularly engaged in business within the state, but which merely enter to do occasional jobs. The vice does not seem to have manifested itself

[140] In Amos *v.* Postal Telegraph-Cable Co. (Fla.), 80 So. 293 (1918), the supreme court of Florida held that a state license fee or occupational tax measured by property within the state should exclude from the computation property employed exclusively in interstate commerce. The opinion regarded the construction as necessary to save the tax from being an unconstitutional regulation of interstate commerce.

in any of the cases of specific taxes that have come before the court, including the excises of Massachusetts and Virginia on foreign corporations. But there is no telling what concerns have been prevented by those taxes from coming in to take small, isolated contracts. Now that the states are assured that they may tax the income from all business done within the state, whether that business is local commerce or interstate commerce, there is no further excuse for any form of specific taxes for a general fiscal purpose.

Through an income tax, the state may tax interstate as well as local commerce. This bears on the question of the reasonableness of specific taxes so long as the states choose to continue them. All that is subject to such a tax in strict legal theory is the local business. But we should not infer from this that the tax becomes an invalid regulation of interstate commerce as soon as it is disproportionate to the local business. The interstate commerce is taxable, if the state goes about it in the right way. It may reach it by valuing property by a capitalization of earnings from its use, by imposing a gross-receipts tax in lieu of other taxes, and by levying a tax on net incomes. So also it should be allowed to reach it by specific taxes on local business, provided those taxes are not otherwise improper. The test of the reasonableness of any form of specific tax should be the relation of the amount demanded, not to the legal *res* which is formally the subject of taxation, but to the economic interest which in the light of all the decisions is actually liable for its proportional contribution to the state fisc.

(*To be concluded.*)

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INDIRECT ENCROACHMENT ON FEDERAL AUTHORITY BY THE TAXING POWERS OF THE STATES[1] VIII

III. Summary and Conclusion

We are often told that a state cannot tax interstate commerce or an instrumentality of the federal government. This is commonly accepted legal doctrine. But in the law, as in human life elsewhere, actions speak louder than words. What judges actually permit and prohibit is more important than what they say about their approval and their disapproval. By their fruits ye shall know them better than by their professions. If judges do in fact permit the states to tax interstate commerce and the instrumentalities of the federal government, that commerce and those instrumentalities may be taxed by the states, all doctrine to the contrary notwithstanding.

It is perhaps too much to hope that all conflict between the formulations of legal doctrine and the substantial results of legal decisions will ever be resolved. Until all catch phrases which clothe half truths in the majesty of the universal and the absolute are banished from common speech, we cannot expect the imaginary deity which calls itself The Law to be free from the foibles of its mortal makers. But those who are interested in law, not as a conceptualist vision, but as an instrument for the actual ordering of human affairs, must necessarily seek to discover how the law does actually order human affairs. They will wish to make their own formulations of the law as it is laid down and applied by those duly vested with authority in the matter. They will be unwilling to accept the formulations of others that do not square with results of the adjudications.

When in this frame of mind we approach the limitations imposed upon the taxing powers of the states by the existence of

[1] For preceding instalments of this discussion, see 31 Harv. L. Rev. 321–72 (January, 1918); *Ibid.*, 572–618 (February, 1918); *Ibid.*, 721–78 (March, 1918); *Ibid.*, 932–53 (May, 1918); 32 Harv. L. Rev. 234–65 (January, 1919); *Ibid.*, 374–416 (February, 1919); and *Ibid.*, 634–78 (April, 1919).

the federal system of government, we find the line of demarcation by no means so clear as familiar formulations would entice us to assume. We discover that in certain ways and to a certain extent a state may tax a federal instrumentality and may tax interstate commerce. We face the problem as one of methods and of degree. We see the solution reached by compromise and by practical adjustment and not by simple discovery of a sharp boundary between two entirely separate spheres of power. We find that the law cannot be summed up in a phrase, but that we must go behind the phrases to the facts.

To Chief Justice Marshall we are indebted for clarity and confusion on the problem of marking the limits of state power. The confusion appears when he professes clarity, and the clarity is manifest when he owns up to perplexity. By neglecting the concrete and rising to the heights of political theorizing, Marshall attains an artificial simplicity which would banish all our difficulties, if words alone were adequate to the task. In *McCulloch* v. *Maryland*,[2] he tells us:

"If we measure the power of taxation residing in a State, by the extent of sovereignty which the people of a single State possess, and can confer on its government, we have an intelligible standard applicable to every case to which the power may be applied."[3]

Find the limits of state sovereignty, and all difficulties are at an end. Sovereignty is the intelligible standard applicable to every case. In praise of his solution, Marshall continues:

"We have a principle which leaves the power of taxing the people and property of a State unimpaired; which leaves to a State the command of all its resources, and which places beyond its reach, all those powers which are conferred by the people of the United States on the government of the Union, and all those means which are given for the purpose of carrying those powers into execution. We have a principle which is safe for the States, and safe for the Union. We are relieved, as we ought to be, from clashing sovereignty; from interfering powers; from a repugnancy between a right in one government to pull down what there is an acknowledged right in another to build up; from the incompatibility of a right in one government to destroy what there is a right in another to preserve. We are not driven to the perplexing inquiry, so unfit for the

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[2] 4 Wheat. (U. S.) 316 (1819).

[3] *Ibid.*, 429–30.

judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power." [4]

If it were really so easy as Marshall here appears to think, the most merciful of critics could hardly condone the wanderings of his successors in the path which he pointed out. With the formula of *McCulloch* v. *Maryland* [5] before them, every dispute should have been speedily and unanimously resolved. But Marshall himself was soon to doubt the magic of his pronouncement of 1819. Eight years later in *Brown* v. *Maryland* [6] we find him aware that the notion of sovereignty is not the simple solvent that it had previously appeared to be. In 1827 he confesses:

"The constitutional prohibition on the States to lay a duty on imports, a prohibition which a vast majority of them must feel an interest in preserving, may certainly come in conflict with their acknowledged power to tax persons and property within their territory. The power, and the restriction on it, though quite distinguishable when they do not approach each other, may yet, like the intervening colours between white and black, approach so nearly as to perplex the understanding, as colours perplex the vision in marking the distinction between them. Yet the distinction exists, and must be marked as the cases arise. Till they do arise, it might be premature to state any rule as being universal in its application." [7]

Here the great Chief Justice tells us that the line between state power and absence of power is not an easy one to mark. A state tax which from one angle is an exercise of lawful authority may from another angle be an encroachment on the field reserved to the

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[4] 4 Wheat. (U. S.) 430.

[5] Note 2, *supra*.

[6] 12 Wheat. (U. S.) 419 (1827).

[7] *Ibid.*, 441. Compare Chief Justice Taney in License Cases, 5 How. (U. S.) 504, 574 (1847): "It is unquestionably no easy task to mark by a certain and definite line the division between foreign and domestic commerce, and to fix the precise point, in relation to every imported article, where the paramount power of Congress terminates, and that of the State begins. They cannot be determined by the laws of Congress or of the States, as neither can by its own legislation enlarge its own powers, or restrict those of the other. And as the Constitution itself does not draw the line, the question is necessarily one for judicial decision, and depending altogether upon the words of the Constitution." That the words of the Constitution have to be supplemented by something extraneous is hinted by the previous recognition that the Constitution itself does not draw the line. How little the words of the Constitution have to do with the problem must be apparent to everyone who has read the judicial opinions which have struggled with its solution.

nation. Taxes which fall in some degree on instrumentalities of the national government or on the fruits of interstate commerce have a double aspect. They are imposed on persons or property or occupations or privileges within the geographical jurisdiction of a state and normally within its legal jurisdiction. They also have some effect on operations within the legal jurisdiction of the United States — a legal jurisdiction assumed to be exclusive. One or the other aspect must be legally predominant, since the same tax cannot be both valid and invalid. But the necessary legal predominance of one aspect cannot obliterate the existence of the other; and the recognized imperative of cleaving only to one does not carry with it any certain indication of the choice between the two. The choice must be made as the cases arise, and without the aid of any rule of universal application. The rule must be the child and not the parent of the cases.

All of the taxes which the Supreme Court has had to consider, from Marshall's day to this, have been demands which it was possible to regard as formally on subjects within the jurisdiction of the state. All have had some effect on interstate commerce or on some operation of the national government. On nearly every crucial question the judges have been in disagreement as to whether the form or the effect should be regarded as controlling. In most important instances this disagreement can be traced to differences of opinion as to the effect to be anticipated from the exercise of state power in question. It may be said, therefore, that the accepted test has always been a judgment on a question of economics, provided it is understood that the judges have been concerned with the economic effect, not of the precise tax before them, but of such a tax levied at the highest rate which a state might be moved to impose. It will not do to accept without qualifications Marshall's statement that "questions of power do not depend on the degree to which it may be exercised," [8] but in general it is true that the court has not forgiven any state tax because the particular rate of levy was so moderate that its effect on national instrumentalities or on interstate commerce was negligible.

The disagreement among the judges which has been characteristic of most of the decisions was not present in *McCulloch* v. *Maryland.*[9] Here the court was unanimous in holding that a Maryland

[8] Brown *v.* Maryland, 12 Wheat. (U. S.) 419, 439 (1819). [9] Note 2, *supra.*

stamp tax on notes issued by the United States bank was a tax on an instrumentality of the national government. The tax was discriminatory, in that it applied only to banks not chartered by Maryland; but the court did not notice this point, and Marshall's opinion is applicable to a nondiscriminatory tax as well. On the other hand the Chief Justice conceded that Maryland might tax the real estate of the bank and the interest of Maryland citizens in the institution "in common with other property of the same description throughout the State." [10] A tax on the issuance of notes was regarded as a tax on the operations of a federal instrumentality; a tax on the real estate was thought to be something else. The only difference between the two appears to be one of degree. One affects or may affect the operations of the bank more seriously than the other.

Brown v. *Maryland* [11] also dealt with a discriminatory tax, and again this was not noted by the court. The law declared invalid required a license of importers of foreign articles and others selling the same by wholesale as a pre-requisite of authority to dispose of them. Retailers of foreign commodities were subject to a companion law. Mr. Justice Thompson dissented. He assumed that retailers would be held taxable and declared that there was no difference in effect between a tax on the wholesaler and one on the retailer. He assumed also that "the law has no relation whatever to the goods intended for transportation to another State," but "applies purely to the internal trade of the State of Maryland." [12] Accepting

[10] 4 Wheat. (U. S.) 316, 436 (1819).

[11] Note 6, *supra*.

[12] 12 Wheat. (U. S.) 419, 451 (1827). The correctness of this assumption may be doubted. Taney, who argued the case on behalf of the state, later expressed his approval of the decision against his client on the express ground that the tax fell on ultimate consumers in other states. In his opinion in the License Cases, 5 How. (U. S.) 504, 575–76 (1847), he says: "The immense amount of foreign products used and consumed in this country are imported, landed, and offered for sale in a few commercial cities, and a very small portion of them are intended or expected to be used in the State in which they are imported. A great (perhaps the greater) part imported, in some of the cities, is not owned or brought in by citizens of the State, but by citizens of other States, or foreigners. And while they are in the hands of the importer for sale, in the form and shape in which they were introduced, and in which they are intended to be sold, they may be regarded as merely *in transitu*, and on their way to the distant cities, villages and country for which they are destined, and where they are expected to be used and consumed, and for the supply of which they were in truth imported. And a tax upon them while in this condition, for State purposes, whether by direct assessment, or indirectly, by requiring a license to sell, would hardly be more justifiable in principle than a transit duty upon the merchandise when passing through a State."

his assumptions, his economics is satisfactory. He has some excuse for neglecting the fact that sales of foreign goods were discriminated against, since Marshall in the majority opinion did not mention the point and declared broadly that so long as the goods remain imports, their sale in the normal way is immune from state taxation. But Marshall would never have allowed a discriminatory tax on sales of imported goods even by retailers after the articles had ceased to be technical imports within his original-package rule. He expressly says that "we do not mean to give any opinion on a tax discriminating between foreign and domestic articles," [13] although the language of the Maryland Act, warranted placing the decision on the ground of such discrimination.

If we take the case on the assumptions on which the majority and minority proceeded, we have the ruling that a general tax on all wholesalers of goods for use within the state cannot be imposed on those wholesalers who deal exclusively in goods of foreign origin which have not previously been sold or taken from their original package. Such a tax is not within the letter of the constitutional prohibition. It adds to the price of foreign goods no more than it adds to the price of home-made articles. Its encroachment on federal authority is indirect, remote, and negligible. To exempt sales of imports from burdens which sales of domestic goods must bear confers a positive benefit upon dealers in foreign goods, and thereby bestows a bounty on importation. Yet Marshall seemed to think that to deny the bounty would be to impose a burden. Now that the federal tax on net income is held not to be a tax on exports although the income taxed is from an exporting business,[14] a state tax on net income must be permitted to reach income from the sale of imports and escape conviction on the charge of being a tax on imports. Mr. Brown, therefore, if he were doing business in Maryland to-day, would find that he had to include all income from his wholesale business in making his returns for the assessment of a general state income tax, notwithstanding the fact that he was a dealer in imports. Thus *Brown* v. *Maryland* [15] has now technical, rather than substantial, importance. It does not stand in the way

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[13] 12 Wheat. (U. S.) 419, 449 (1827).

[14] Peck & Co. *v.* Lowe, 247 U. S. 165, 38 Sup. Ct. Rep. 432 (1918), 32 Harv. L. Rev. 639.

[15] Note 6, *supra*.

of state taxation of the economic enterprise which in 1827 was relieved of a $50 license fee. It still forbids specific impositions on the business of selling imports, but this goes, not so much to the existence of state power, as to the manner of wielding it. The famous decision would have been more impregnable against the assaults of time if it had been confined to discriminatory taxation. Though the Supreme Court has never relaxed its doctrine that no license fee can be imposed on foreign or interstate commerce, all the license fees with which it has had to deal have been imposed on selected enterprises and have therefore had in them the seeds of discrimination.

Two years after *Brown* v. *Maryland* [16] came *Weston* v. *City Council of Charleston*.[17] Here, too, there was discrimination, for the tax in question was one imposed, not on all property, but on certain selected species, among which "six and seven per cent stock of the United States" was included. In holding the levy on United States stock an invalid interference with the borrowing power of the national government, Marshall made no mention of the fact that such stock was taxed while certain other property went free. Mr. Justice Johnson in his dissent assumed also that there was no discrimination against United States bonds, as is evident from the concluding paragraphs of his opinion:

"Why should not the stock of the United States, when it becomes mixed up with the capital of its citizens become subject to taxation in common with other capital? Or why should one who enjoys all the advantages of a society purchased at a heavy expense, and lives in affluence upon an income derived exclusively from interest on government stock, be exempted from taxation?

"No one imagines that it is to be singled out and marked as an object of persecution, and that a law professing to tax, will be permitted to destroy; this subject was sufficiently explained in McCulloch's case. But why should the states be held to confer a bonus or bounty on the loans made by the general government? The question is not whether their stock is to be exposed to peculiar burdens; but whether it shall enjoy privileges and exemptions, directly interfering with the power of the states to tax or to borrow.

"I can see no reason for the exemption, and certainly cannot acquiesce in it." [18]

[16] Note 6, *supra*.

[17] 2 Pet. (U. S.) 449 (1829), 31 Harv. L. Rev. 327–29.

[18] 2 Pet. (U. S.) 449, 473 (1829).

Mr. Justice Thompson also dissented. He understands that the majority means to hold that stock of the United States "is not to be included in the estimate of property subject to taxation" on "the broad ground" that it is "not taxable in any shape or manner whatever." [19] His objection to the decision is that the interference with the United States from permitting the tax is slight as compared with the evil of exempting the property and creating a privileged class of public creditors:

"No one procures stock without exchanging for it an equivalent in money or some other property; all which was, doubtless, subject to the payment of taxes. Exemption from taxation may hold out an inducement to invest property in stock of the United States, and might, possibly, enable the government to procure loans with more facility, and perhaps on better terms. But this possible, or even certain benefit to the United States, cannot extinguish pre-existing state rights. To consider this a tax upon the means employed by the general government for carrying on its operations, is, certainly, very great refinement. It is not a tax that operates directly upon any power or credit of the United States. The utmost extent to which the most watchful jealousy can lead is, that it may, by possibility, prevent the government from borrowing money on quite so good terms. And even this inconvenience is extremely questionable; for the stock only pays the same tax that the money with which it was purchased did. And whether the property exists in one form or the other, would seem to be matter of very little importance to the owner. But great injustice is done to others, by exempting men who are living upon the interest of their money, invested in stock of the United States, from the payment of taxes; thereby establishing a privileged class of public creditors who, though living under the protection of the government, are exempted from bearing any of its burdens. A construction of the Constitution, drawing after it such consequences, ought to be very palpable before it is adopted." [20]

In 1842, *Dobbins* v. *Commissioners of Erie County* [21] held without dissent that a revenue officer of the United States could not be subjected to a state tax imposed on "all offices and posts of profit." The law made it the duty of the assessors "to rate all offices and posts of profit, professions, trades, and occupations, at their discretion, having a due regard to the profits arising therefrom." [22]

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[19] 2 Pet. (U. S.) 476.

[20] *Ibid.*, 478.

[21] 16 Pet. (U. S.) 435 (1842).

[22] *Ibid.*, 445.

The tax appears to have been one of the so-called faculty taxes, rather than an income tax. The plaintiff's office was assessed at $500, and the assessments on it for three years had amounted altogether to $10.75. The tax could hardly be called discriminatory, for it reached not only all professions, trades and occupations, but all idle bachelors over the age of twenty-one. The absence of discrimination was called to the attention of the court by counsel for the county, but was not referred to in the opinion. The decision proceeded on the broad ground that the salaries of all officers of the United States are exempt from taxation by the states. It was assumed without analysis that state taxation on federal salaries, whether discriminatory or not, would affect the compensation which the federal government would have to pay its officials. While the opinion as a whole is based on political rather than on economic considerations, Mr. Justice Wayne introduces the latter when he says:

"Is the officer, as such, less a means to carry into effect these great objects than the vessel which he commands, the instruments which are used to navigate her, or than the guns put on board to enforce obedience to the law? These inanimate objects, it is admitted, cannot be taxed by a state, because they are means. Is not the officer more so, who gives use and efficacy to the whole? Is not compensation the means by which his services are procured and retained? It is true it becomes his when he has earned it. If it can be taxed by a state as compensation, will not Congress have to graduate its amount, with reference to its reduction by the tax? Could Congress use an uncontrolled discretion in fixing the amount of compensation, as it would do without the interference of such a tax? The execution of a national power by way of compensation to officers, can in no way be subordinate to the action of the state legislatures upon the same subject. It would destroy also all uniformity of compensation for the same service, as the taxes by the states would be different. To allow such a right of taxation to be in the states, would also in effect be to give the states a revenue out of the revenue of the United States, to which they are not constitutionally entitled, either directly or indirectly, neither by their own action, nor by that of Congress." [23]

Later on the learned justice treats a tax on the salary as equivalent to a prohibition of the receipt of the salary and therefore in direct

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[23] 16 Pet. (U. S.) 448.

conflict with the Act of Congress authorizing its payment from the federal treasury.[24]

The element of discrimination which had been present in the three cases decided in Marshall's time, and which had passed unnoticed, received explicit consideration from Mr. Justice Nelson in *Bank of Commerce* v. *New York City*[25] decided in the second year of the Civil War. The learned justice's treatment of the point is not wholly immune from criticism. The tax before him was one on the capital stock of a bank, and the decision was that a tax on the capital was a tax on the property in which the capital was invested, and that such part of this capital as was invested in United States bonds must be excluded from assessment. In answer to the contention that the Weston case did not apply to such a tax, he said:

"It is true that the ordinance imposing the tax in the case of *Weston* vs. *The City of Charleston*, did discriminate between the stock of the United States and other property — that is, the ordinance did not purport to impose a tax upon all the property owned by the taxpayers of the City, and specially excepted certain property altogether from taxation. The only uniformity in the taxation was, that it was levied equally upon the articles enumerated, and which were taxed. To this extent it might be regarded as a tax on the stock *eo nomine*. But does this distinction thus put forth between the two cases distinguish them in principle? The argument admits that a tax *eo nomine*, or one that distinguishes unfavorably the stock of the United States from the other property of the taxpayer, cannot be upheld. Why? Because, as is said, if this power to discriminate be admitted to belong to the State it might be exercised to the destruction of the value of the stock, and, consequently, of the power or function of the Federal Government to issue it for any practical uses. . . . It will be seen, therefore, that the distinction claimed rests upon a limitation of the exercise of the taxing power of the State; that if the tax is imposed indiscriminately upon all the property of the individual or corporation, the stock may be included in the valua-

[24] "The compensation of an officer of the United States is fixed by a law made by Congress. It is in its conclusive discretion to determine what shall be given. It exercises the discretion and fixes the amount, and confers upon the officer the right to receive it when it has been earned. Does not a tax then by a state upon the office, diminishing the recompense, conflict with the law of the United States, which secures it to the officer in its entireness? It certainly has such an effect; and any law of a state imposing such a tax cannot be constitutional, because it conflicts with a law of Congress made in pursuance of the Constitution, and which makes it the supreme law of the land." (16 Pet. (U. S.) 435, 449–50.)

[25] 2 Black (U. S.) 620 (1862), 31 HARV. L. REV. 329.

tion; if not, it must be excluded or cannot be reached. The argument concedes that the Federal stock is not subject to the general taxing power of the State, a power resting in the discretion of its constituted authorities as to the objects of taxation, and the amount imposed." [26]

But the argument need not make any such concession. Whether United States bonds are subject to the taxing power of the state may depend upon the effect of such taxation on the borrowing power of the nation. The effect will vary with the methods adopted. If United States bonds are taxed and securities which compete for buyers are exempted, the former are placed at a disadvantage. The same result does not necessarily follow when all corporations are taxed on their capital irrespective of the securities in which it is invested. Certainly the effect of such a tax differs from the effect of a discriminatory tax, and the concession that a state may not impose a tax "that distinguishes unfavorably the stock of the United States from the other property of the taxpayer" does not in common sense carry an admission that a state cannot impose a tax which avoids any such unfavorable distinction.

Mr. Justice Nelson is to be criticized also for his later assertion that it cannot be a question for judicial determination whether there is discrimination. He thinks that if the state can tax in any way, it must necessarily be free to tax in every way. Restraints against discrimination can be imposed only by the state itself. This conclusion is interwoven with the assumption that any complaint against discrimination goes only to the wisdom or unwisdom of an exercise of power and not to the existence or lawfulness thereof. The absence of any inexorable necessity for such a position is demonstrated by the cases dealing with state taxes on peddlers or property and holding them invalid when goods or the sales of goods of extra-state origin are selected for discriminatory burdens.[27] Congress has made the absence of discrimination the test of state authority to tax the shares of stock in national banks, and the Supreme Court has had abundant practice in applying the test.[28]

That the test of discrimination is often a difficult one to apply may be conceded. Mr. Justice Nelson is on firmer ground when he

[26] 2 Black (U. S.) 620, 629–30 (1862).

[27] Welton *v.* Missouri, 91 U. S. 275 (1875); Darnell *v.* Memphis, 208 U. S. 113, 28 Sup. Ct. Rep. 247 (1908), 31 Harv. L. Rev. 573–74.

[28] See 31 Harv. L. Rev. 344–69.

lays emphasis on this point in the succeeding paragraph of his opinion:

"There is and must always be a considerable latitude of discretion in every wise Government in the exercise of the taxing power, both as to the objects and the amount, and of discrimination in respect to both. Property invested in religious institutions, seminaries of learning, charitable institutions, and the like, are examples. Can any Court say that these are discriminations which, upon the argument that seeks to distinguish the present from the case of *Weston* vs. *The City of Charleston*, would or would not take it out of that case?"[29]

Such difficulties have had to be solved in dealing with taxes on shares of stock in national banks, but a court may well hesitate to invite them when not required so to do. If United States bonds were taxable as property, investors would undoubtedly find ways to use their funds for purchase of other securities on which the tax burden was actually or apparently lighter. An apparent exemption which was not an actual one would nevertheless affect the market for other securities unfavorably. But these considerations, which might justify a court in refusing to allow United States bonds to be subject to a property tax, are not pertinent to the issue whether they may be included in the assessment of a tax on the capital of a corporation. If the corporation must pay the same tax whatever the rank or title of its investments, it is denied access to places of untaxed refuge which may be open to an individual. It can reduce its tax only by the Samson-like method of diminishing its assets. Mr. Justice Nelson's remarks on the difficulty of applying the test of discrimination may justify a refusal to limit *Weston* v. *City Council of Charleston*[30] to a tax that is patently discriminatory, since the tax there involved was directly on property; but the difficulties which the learned justice suggested were absent from the case before him.

If we put to one side the question of discrimination, we can readily agree that a tax on the capital of a corporation is a tax on the property in which that capital is invested. To tax United States bonds through a tax on corporate capital may have a different effect on the federal borrowing power than to tax them directly, but none the less it is the bonds that are taxed. In *Bank Tax Case*,[31]

[29] 2 Black (U. S.) 620, 631 (1862).

[30] Note 17, *supra*.

[31] 2 Wall. (U. S.) 200 (1864), 31 Harv. L. Rev. 330.

which followed *Bank of Commerce* v. *New York City*,[32] Mr. Justice Nelson remarked wisely:

"It is not easy to separate the property in which the capital is invested from the capital itself. It requires some refinement to separate the two thus intimately blended together. The capital is not an ideal, fictitious, arbitrary sum of money set down in the articles of association, but, in the theory and practical operation of the system, is composed of substantial property, and which gives value and solidity to the stock of the institution." [33]

If it is conceived that any and all taxes on federal securities are unconstitutional obstructions to the federal borrowing power, the state should not be allowed to escape from the restriction by calling the securities some book-keeping name. It is clear that in *Bank Tax Case* [34] and *Bank of Commerce* v. *New York City*,[35] the Supreme Court meant to protect federal securities from state taxation in any form. A court could hardly be expected to do otherwise while the Civil War was raging and the government at Washington needed all the support to its credit that was available. It was no time for nice discriminations between burdens and denial of bounties.

A few years later, however, when the conflict between the states had ended, a majority of the Supreme Court allowed a state to impose a tax on the privilege of being a corporation and measure the amount by assets which included United States bonds.[36] Then followed decisions allowing inheritance taxes on bequests of federal securities [37] and permitting the economic value contributed by United States bonds owned by a corporation to be included in the assessment of the shares of stock owned by individuals.[38] So far as appears, federal securities may be a source of state revenue both through a tax on the franchise of a corporation and a tax on the shares owned by individuals. The difference between a tax on

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[32] Note 25, *supra*.

[33] 2 Wall. (U. S.) 200, 208–09 (1865).

[34] Note 31, *supra*.

[35] Note 25, *supra*.

[36] Society for Savings *v.* Coite, 6 Wall. (U. S.) 594 (1868); Provident Savings Institution *v.* Massachusetts, 6 Wall. (U. S.) 611 (1868); Hamilton Co. *v.* Massachusetts, 6 Wall. (U. S.) 632 (1868); Home Insurance Co. *v.* New York, 134 U. S. 594, 10 Sup. Ct. Rep. 593 (1890); 31 Harv. L. Rev. 331–35.

[37] Plummer *v.* Coler, 178 U. S. 115, 20 Sup. Ct. Rep. 829 (1900), 31 Harv. L. Rev. 336.

[38] Van Allen *v.* Assessors, 3 Wall. (U. S.) 573 (1866); Cleveland Trust Co. *v.* Lander, 184 U. S. 111, 22 Sup. Ct. Rep. 394 (1902); 31 Harv. L. Rev. 339–41.

the capital of a corporation and a tax on its franchise measured by its capital is one between tweedledum and tweedledee. Since taxes on a corporation are in last analysis taxes on the interest of the shareholders in the corporate assets or business, to exclude federal securities from the computation of a tax on the corporate capital and to include them in the assessment of the shares of stock is to allow the state to reach with one hand what it is forbidden to touch with the other. The idea that federal securities cannot be taxed by a state is a mythical fancy so long as such securities belonging to a corporation may enter into the assessment of a tax on the corporate franchise and of a further tax on the interest of the shareholders in the corporation.

The burden put upon the federal borrowing power by such taxation of federal securities in the vaults of corporations is of course a more limited one than would be imposed by their inclusion in all property taxation. But the court in subjecting United States bonds owned by corporations to the fiscal power of a state did not go on any such common-sense distinction. The inclusion of the bonds in the assessment of franchise taxes was sustained on the theory of the absolute power of a state over privileges which it might grant or withhold.[39] The taxation of shares at their full value without deduction of the contribution of United States bonds to that value was approved on the basis of a notion of the "separate individuality" of a corporation and its stockholders.[40] The first of these theories has since been deprived of capacity to enable a state to measure taxes on the local business of foreign corporations engaged also in interstate commerce by the value of their total capital stock.[41] The second has been refused recognition in a recent case[42] in which a state sought to impose double taxation on the economic interest in shares of a national bank owned by another national bank. It had previously been commented on unfavorably by Mr. Justice Moody in *Home Savings Bank* v. *Des Moines*,[43] which found that a

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[39] See passage quoted from Home Insurance case in 31 HARV. L. REV. 334. "No constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privileges it bestows."

[40] See passage quoted from the Lander case in 31 HARV. L. REV. 341.

[41] Western Union Telegraph Co. *v.* Kansas, 216 U. S. 1, 30 Sup. Ct. Rep. 190 (1910), and cases following it. See 31 HARV. L. REV. 584–618, 937–53.

[42] Bank of California *v.* Richardson, 248 U. S. 476, 39 Sup. Ct. Rep. 165 (1919).

[43] 205 U. S. 503, 27 Sup. Ct. Rep. 571 (1907), 31 HARV. L. REV. 341–44.

state tax was imposed on the property of a corporation and not on that of its shareholders, as the state court had held. It is therefore apparent that the decisions allowing United States bonds to be taxed through levies on corporate franchises and shares of stock are open to reëxamination.

The decision which thwarted a state's endeavor to get two taxes out of some national bank stock is *Bank of California* v. *Richardson*,[44] decided January 27, 1919. The plaintiff national bank owned shares in another national bank known as D. O. Mills and Company. It was held taxable on those shares on the authority of *Bank of Redemption* v. *Boston* [45] which held that congressional permission to tax the shares of national banks to their owners extended to shares owned by other national banks. The state sought also to tax the shareholders of the plaintiff bank on the full value of their stock without any deduction for that part of the value due to the stock of the Mills National Bank owned by the plaintiff bank. The minority of the court declared that this was within the letter of the congressional permission, and brought to bear the traditional theory that the property interest of the stockholder is essentially different from that of the corporation, and that therefore a tax on the stockholder's interest in the plaintiff bank was not a tax on the property of the plaintiff. But the majority held that the purpose of the congressional permission was to allow but a single tax on national bank shares and that this purpose was defeated if the shares in the Mills Bank, after being taxed directly to the plaintiff bank which owned them, entered into the assessment of another tax on the shares of the plaintiff bank owned by individuals. The notion of "separate individuality" was not allowed to support a result deemed undesirable and in substance, though not literally, without the congressional permission upon which state power over national bank stock is held to rest. The Chief Justice's treatment of the issue is not so sharp as might be desired, but the basis of the decision may be gathered from the following paragraphs:

"It is undoubted that the statute from the purely legal point of view, with the object of protecting the federal corporate agencies which it created from state burdens and securing the continued existence of such agencies despite the changing incidents of stock ownership, treated the banking corporations and their stockholders as different. But it is also

[44] Note 42, *supra*.

[45] 125 U. S. 60, 8 Sup. Ct. Rep. 772 (1888).

undoubted that the statute for the purpose of preserving the state power of taxation, considering the subject from the point of view of ultimate beneficial interest, treated the stock interest, that is, the stockholder, and the bank as one and subject to one taxation by the methods which it provided. . . . Again, when the purposes of the statute are taken into view, the conclusion cannot be escaped that the transmutation of the stock interest of the California in the Mills Bank, into an asset of the California Bank subject to be taxed for the purpose of reaching its stockholders, is to overthrow the very fundamental ground upon which the taxation of stockholders must rest." [46]

On the basis of this decision, it would be possible to support the contention that United States bonds owned by a corporation, since they must be excluded from the computation of a tax on the capital of the corporation, must also be excluded from a tax on the shares of stock in the corporation. Evidently a majority of the Supreme Court favored this view in 1907, when *Home Savings Bank* v. *Des Moines* [47] was decided, though the contrary view was recognized as too firmly established to be overthrown. It is to be assumed, therefore, that the Supreme Court will continue to permit the states to tax United States bonds owned by corporations through full assessment of their shares of stock. It would be wholesome, however, if some better basis for such taxation could be found than the unsubstantial one that the property of the shareholders is distinct from that of the corporation.

Such a basis appears in the rules which have been worked out in the field of state taxation of interstate commerce. If we discard all the doctrinal disquisitions of the opinions and look only to the results of the decisions, we find that the controlling motive of the Supreme Court has been the desire to prevent the states from imposing on interstate commerce any peculiar or unusual burden. Where the court has been assured that the state did not have a device which might be operated to discriminate against interstate commerce, taxation of that commerce has been allowed. Net income from interstate commerce may be included in a general income tax.[48] Property used in interstate commerce may be assessed by

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[46] 248 U. S. 476, 485, 39 Sup. Ct. Rep. 165 (1919).

[47] Note 43, *supra*. See 31 HARV. L. REV. 343.

[48] United States Glue Co. *v.* Oak Creek, 247 U. S. 321, 38 Sup. Ct. Rep. 499 (1918), 32 HARV. L. REV. 634–43.

capitalizing the earnings from the business which it serves.[49] Even gross receipts from interstate commerce may be taxed in the guise of a property tax where the result is no more than a fair equivalent for ordinary property taxation.[50] The decisions sanctioning these results make it clear that a state which confines its taxation to levies on tangible property and on net income will have to take little or no account of the commerce clause. When it imposes license or franchise or occupation taxes, or adopts any other revenue devices which are not certain to fall equally on all enterprise within the state, then it runs the risk of disappointment whenever it seeks to lay its hand on interstate commerce. What the court is insistent upon is that there must be adequate safeguards against subjecting interstate commerce to heavier taxation than local commerce. It does not require the states to confer a bounty upon interstate commerce by exempting it from burdens which competing business must bear.

The substantial reason back of these decisions is that interstate commerce is not prejudiced by a summons to bear its proportionate contribution to the treasuries of the states. So, too, the borrowing power of the United States is not interfered with by proportionate taxation of the obligations created by its exercise. Taxation of the full value of the shares of corporate stock, without inquiry into the character of the corporate property which gives that stock some or all of its value, can seldom, if ever, discriminate against part of that property in favor of another part. A corporation will be likely to buy the same amount of United States bonds whether the shares of its stockholders are taxed at their full value or are entirely exempt. Taxation of the shares is not, in form, taxation of the property of the corporation. Technically, therefore, such taxation does not fall on a federal instrumentality, even when the corporation owns United States bonds. If, then, a tax on the shares does not actually place the United States at a disadvantage in marketing its bonds, there is no basis either formal or substantial on which to require the exclusion of the value contributed by such bonds from the assessment of the shares.

A more difficult problem confronts us when we seek to distinguish between a tax on corporate capital and a tax on a corporate franchise measured by the amount of the capital. The distinction

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[49] 32 Harv. L. Rev. 239–65.

[50] 32 Harv. L. Rev. 377–416.

is no longer accorded recognition to enable a state to impose on foreign corporations engaged partly in interstate commerce a tax which is in substance on extra-state property.[51] Should it continue to allow a state to tax United States bonds owned by a corporation through the device of a tax on the franchise of a corporation measured by the value of its capital? The answer must depend upon whether there is any substantial reason for holding that a tax directly on the capital must exclude such part thereof as is invested in United States bonds. To require such exclusion is to grant a bounty to the federal borrowing power. The extent of the bounty would be appreciated if the obligations of competing debtors were similarly excluded. The denial of this bounty, therefore, cannot in substance be regarded as an interference with the federal borrowing power. We may accept the conclusions that a tax on corporate capital is a tax on the property in which it is invested, and that a tax on United States bonds is a tax on a federal instrumentality. If, however, some particular tax on that instrumentality does not in fact burden or interfere with its exercise, there is no economic ground on which to declare it unconstitutional. If all other possible grounds are removed by changing the tax from one formally on capital to one formally on a franchise, there is no remaining obstacle to the assertion of state power.

Two objections may be made to the foregoing discussion. The first is that the United States bonds are taxed twice if they are reached through an assessment of the corporate franchise and a further assessment of the shares of stock. This is true. But they can be taxed twice only as the obligations of competing debtors are similarly taxed. This form of double taxation cannot discriminate against one borrower in favor of another. If the corporation and its stockholders will be subject to separate taxation of their respective legal interests without regard to the character of the investments of the corporation, this double taxation cannot exercise any direct influence on the corporation in its choice of investments. On the other hand, if United States bonds are excluded from the assessment of either tax, while the obligations of competing debtors are included in the assessment of both, the federal government has been granted a preference. This answer, it must be recognized, flies in the face of *Bank of California* v. *Richardson*.[52] If that de-

[51] Note 41, *supra*.

[52] Note 42, *supra*.

cision has any sound economic justification, the Supreme Court ought to apply it to the objection against double taxation now under consideration. The reply is that *Bank of California* v. *Richardson* [53] is not supportable on economic grounds. It must stand or fall on the assumption on which it proceeds, *i. e.*, that Congress has expressly dealt with the problem and permitted but a single tax on the economic interest represented by shares in national banks.[54]

The further objection to the inclusion of United States bonds in assessments of corporate franchises and shares of stock is that such inclusion may in fact operate to deter corporations from investing in those bonds. The argument runs as follows. With the normal difference between the interest rate of public and of private obligations due to the superior security of the former, a tax on capital value would bear more heavily on the bonds with the lower interest rate. Those who might prefer three-per-cent government bonds to six-per-cent railroad bonds, when both were exempt from taxation, would be likely to alter their preference if a two-per-cent tax reduced the income to one and four per cent respectively. The discrepancy would be reduced by the resulting alterations of capital value, but the effect on the borrowing power of the United States would not thereby be lessened. Giving full account to the fact that the capacity of the United States to borrow at lower interest rates than individuals or corporations is due in considerable part to a bounty conferred by the exemption of federal securities from burdens that competitors must bear, it may still be true that the removal of the exemption would in many instances be something more than the denial of a bounty. It may operate practically to deny to the government a part of the advantage conferred by the excellence of its credit. There may be a minimum to the total net income with which an investor will be content without looking for all possible ways of increase. He may look less favorably on three- or four-per-cent bonds subject to a two-per-cent tax, even though six-per-cent

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[53] Note 42, *supra*.

[54] The Chief Justice hints that he could support the case on economic grounds if he had to, but he refrains from elaborating the hint. On page 485 he says: "We do not stop to point out the double burden resulting from the taxation of the same value twice which the assessment manifested, as to do so could add no cogency to the violation of the one power to tax by the one prescribed method conferred by the statute and which was the sole measure of the state authority."

bonds also yield only four per cent net, than on the same three or four per cents when they and the six per cents produce a net yield of those amounts. It is more congenial to give the state a third of one's income from any given source than to divide fifty-fifty. Though a corporation may make a sacrifice of income to gain the benefit of sure and quick assets, its sacrificial spirit is likely to vary inversely with the amount involved in its indulgence. Whether a corporation would be wise to reduce its proportion of high-grade assets because of a diminution in their net yield is not in point. If it would in fact do so, a nondiscriminatory tax on the capital value of all its assets in whatever form imposed, would reduce the market for United States bonds.

Here is an incalculable factor. It may be of considerable or of little importance. An argument against allowing it consideration may be found in the fact that there is no reason why an investor should ever take less interest than he can get, except as he receives other advantages which he regards as compensatory. A corporation which foregoes income to gain security ought to stick to its choice even when pinched by increased taxation or by any other expense. It would have the same inducement to increase its interest receipts, whatever the cause of its decreased net income — whether it has to spend an additional $5,000 for taxes or for increased wages. It could hardly be said that a labor union was interfering with a federal instrumentality because it succeeded in establishing such higher wage schedules that the employing corporation decided to invest henceforth only in seven-per-cent stocks in order to maintain its rate of dividends. The analogy affords a basis for the argument that such effect as taxation of corporate stock or franchise may have to deter the corporation from purchasing high-grade low-interest-bearing securities must be regarded as indirect, since the same effect may be contributed by other factors.

Nevertheless it remains true that taxation measured by the value of securities owned, and which therefore in effect falls on those securities, falls more heavily on securities with the lower interest yield. The ratio between the net yield of public and of private obligations is more favorable to the latter when both are taxed on their capital value than when both are exempt. It may well be, therefore, that state taxation directly on United States bonds should be forbidden on economic grounds. How, then, are we to

justify state taxation indirectly on those bonds? The best answer seems to be that their exemption from direct taxation is not only protection against a burden but also the grant of a bounty. The two cannot be separated. The states, therefore, are required to lend positive aid to the federal borrowing power at considerable sacrifice to themselves. This aid is given to the entire market afforded by individual investors. Such aid may well be credited to the states against any charge that full taxation of corporate shares and franchises deprives the federal government to some extent of the advantages due to its superior credit by making corporations less ready to sacrifice security for income.

It is obvious that the deleterious effect on the federal borrowing power which may possibly ensue from state taxation on the capital value of all stocks and bonds will not follow from state levies on all net income. A two-per-cent tax on the capital value of two $1,000 bonds both selling at par, one issued by the government and paying $30 annually, and the other issued by a private corporation and paying $60 annually, will reduce their net yield to $10 and $40 respectively. The tax takes two-thirds of the income from the government bond and only one-third of the income from the corporation bond. On the other hand a thirty-per-cent tax on the income from the bonds would reduce their net yield to $21 and $42 respectively, leaving the ratio between them the same as when both are exempt. It might therefore be urged that the states should be allowed to include income from federal securities in a general income tax. Such a tax can be called one "upon the person for the general advantages of living in the jurisdiction," [55] or "but a method of distributing the cost of government," [56] or some of the other names that have been found convenient in sustaining taxes. Its effect on the federal borrowing power may be declared "indirect and remote," like the effect on exportation of a tax on net income from an exporting business.[57] It would not, it is conceived, place the federal borrowing power under any disadvantages that it would not labor under if all intangibles were entirely exempted from any form of taxation.

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[55] Mr. Justice Holmes, in Fidelity & Columbia Trust Co. *v.* Louisville, 245 U. S. 54, 58, 38 Sup. Ct. Rep. 40 (1917), 32 Harv. L. Rev. 655.

[56] Mr. Justice Pitney in United States Glue Co. *v.* Oak Creek, 247 U. S. 321, 329, 38 Sup. Ct. Rep. 499 (1918), 32 Harv. L. Rev. 636.

[57] See Mr. Justice Van Devanter in Peck & Co. *v.* Lowe, 247 U. S. 165, 174–75, 38 Sup. Ct. Rep. 432 (1918), 32 Harv. L. Rev. 639.

To exclude interest on United States bonds from a general state income tax is to confer upon the federal borrowing power a bounty to the extent of the exemption. To include such income would regulate the activities of the federal government no more than the permitted inclusion of income from interstate commerce regulates that commerce "in a constitutional sense." It seems, therefore, that the reason for the exemption of income from United States bonds from state-wide income taxes must be political rather than economic. It must be a conception that the federal government is entitled to claim from the states a subsidy for its borrowing power.

It is interesting that no case has specifically held that the states cannot include income from federal bonds in a general state income tax. It is clear, however, that until recently, at any rate, the Supreme Court has regarded a tax on income as indistinguishable from a tax on the source of the income. In *Pollock* v. *Farmers' Loan & Trust Co.*,[58] which held that the federal government cannot tax the income from state and municipal bonds, Chief Justice Fuller declared:

"It is contended that although the property or revenues of the States or their instrumentalities cannot be taxed, nevertheless the income derived from state, county, and municipal securities can be taxed. But we think the same want of power to tax the property or revenues of the States or their instrumentalities exists in relation to a tax on the income from their securities, and for the same reason, and that reason is given by Chief Justice Marshall in *Weston* v. *Charleston*, 2 Pet. 449, 468, where he said: 'The right to tax the contract to any extent, when made, must operate upon the power to borrow before it is exercised, and have a sensible influence on the contract. The extent of this influence depends on the will of a distinct government. To any extent, however inconsiderable, it is a burthen on the operations of government. It may be carried to an extent which shall arrest them entirely. . . . The tax on government stock is thought by this court to be a tax on the contract, a tax on the power to borrow money on the credit of the United States, and consequently to be repugnant to the Constitution.' Applying this language to these municipal securities, it is obvious that taxation on the interest therefrom would operate on the power to borrow before it is exercised, and would have a sensible influence on the contract, and that the tax in question is a tax on the power of the States and their instrumentalities to borrow money, and consequently repugnant to the Constitution."[59]

[58] 157 U. S. 429, 15 Sup. Ct. Rep. 673 (1895). [59] *Ibid.*, 585–86.

Earlier in the opinion the Chief Justice reviewed the cases forbidding either the states or the nation to tax the salaries of the officers of the other, and plainly regarded the want of national power to tax income from state securities as the complement of an undoubted absence of state power to tax income from federal securities.

Though this immunity of federal securities from state taxation has been regarded as inherent in the federal system created by the Constitution, Congress has taken the precaution specifically to declare that United States bonds shall be exempt from state taxation. The Act of February 25, 1862,[60] specifies that "all stocks, bonds, and other securities of the United States held by individuals, corporations, or associations within the United States, shall be exempt from taxation by or under State authority." The Act of July 14, 1870,[61] mentions "the interest thereon" as well as the bonds. The Act of June 28, 1902,[62] is content with declaring exemption "from taxation in any form by or under State, municipal, or local authority;" but the recent acts under which Liberty Bonds have been issued require the states to refrain from taxing both "principal and interest."[63] Thus the only constitutional question which could now be brought before the court is the existence *vel non* of congressional power to decree the exemption of principal and interest of federal securities from state taxation. No one can doubt that this power will be sustained, even though the court might now be persuaded that the exemption is a bounty rather than the fending off of a burden. If Congress deems that the exigencies of the national government require that national obligations be wholly free from state taxation in any form whatsoever, its judgment will never be overruled by the Supreme Court.

Congress has been content to be silent with respect to state taxation of income from corporate dividends when the corporate income

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[60] 12 STAT. AT L. chap. 33, § 2, p. 346, 8 FED. STAT. ANN. 2 ed., 407.

[61] 16 STAT. AT L. 272. ". . . all of which several classes of bonds and the interest thereon shall be exempt from the payment of all taxes or duties of the United States, as well as from taxation in any form by or under State, municipal, or local authority."

[62] 32 STAT. AT L. 484. This was the statute authorizing the issue of the so-called Panama Canal bonds.

[63] FED. STAT. ANN. — 1918 Supp. 673: ". . . both principal and interest shall be exempt from all taxes or duties of the United States as well as from taxation in any form by or under State, municipal, or local authority." (Act of March 3, 1917.) Similar language is used in the Act of September 24, 1917, FED. STAT. ANN. — 1918 Supp. 684.

is from United States bonds, and state taxation of corporate franchises measured by earnings some of which are from United States bonds. *Flint* v. *Stone Tracy Co.*[64] permitted income from state bonds to be included in the measure of a federal excise on doing business in corporate capacity. *Lynch* v. *Hornby*[65] held that cash dividends paid to stockholders after the effective date of the federal income tax law of 1913 were taxable to them as income, although the dividends were the fruit of a surplus accumulated by the corporation before the enactment of the Sixteenth Amendment. Corporate income which was exempt is taxable when transmuted into stockholder's income. Corporate income which cannot be taxed may be made the measure of a tax on doing business in corporate form. Here are precedents to lean on in sanctioning state taxation of stockholder's income without regard to its economic origin, and state taxation of income from United States bonds when the tax is not formally on income, but on a privilege measured by income.

On the other hand, the distinction between the subject and the measure of the tax was dishonored by the court when Kansas sought to tax extra-state property in the guise of a tax on the privilege of a foreign corporation to do local business in connection with interstate business,[66] and the distinction between the shareholder's interest in the corporation and the property held by the corporation was disregarded when California sought to tax the stockholders of a national bank on the full value of their shares, without deduction for the contribution made to that value by the shares of another national bank owned by the corporation.[67] Obviously in dealing with the issues now under consideration the Supreme Court is at liberty to accept or reject formal distinctions as it chooses. That is one of the characteristic merits and demerits of formal distinctions. It is a demerit in that it makes prophecy and logical consistency difficult or impossible. It is a merit in that it permits a court to reach such results as its best judgment dictates.

We have already indicated the reasons which may be advanced, in support of the position that the Supreme Court should adhere to

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[64] 220 U. S. 107, 31 Sup. Ct. Rep. 342 (1911).

[65] 247 U. S. 339, 38 Sup. Ct. Rep. 543 (1918).

[66] Note 41, *supra.*

[67] Note 42, *supra.*

its formal distinctions and permit income from federal securities to be taxed by the states through excises on corporate franchises and through taxes on corporate dividends. If considerations of substance do not require exclusion of United States bonds from assessments of corporate franchises and shares of stock, *a fortiori* such assessments should be permitted to include income from United States bonds. Such taxes measured by income do not deprive borrowers with superior credit of any advantage which that credit gives. Double taxation of stockholder and corporation does not influence the choice of corporate investments. And any margin of error in such calculations is more than offset by the bounty conferred on the federal borrowing power by exemption of interest on United States bonds from an income tax which feeds on interest from competing obligations.

Thus there appears to be no substantial reason for adding new limitations to the power of the states to levy taxes which fall indirectly on federal instrumentalities. The distinction between taxes on corporate capital and taxes on corporate franchises or on shares of stock may be artificial, but it serves a useful purpose; and this on the whole is the most reliable test of the merit of a distinction. Since taxes directly on United States bonds do not have the serious effect on the federal borrowing power which judges of the Supreme Court have often assumed, there is good sense in not extending to indirect taxation the prohibitions against direct taxation. Animated by such good sense, the Supreme Court has allowed the states to tax income from interstate commerce and the United States to tax income from an exporting business. It has appreciated that a general tax on all net income does not cast any unwarranted burden on any particular enterprise from which such income issues. If the Supreme Court were making the law of the Constitution *de novo*, it might therefore be expected to allow the states to tax interest on federal securities and income from federal salaries, granting to the United States a similar power over the fruits of state functions. The economic implications of *Peck & Co.* v. *Lowe* [68] and *United States Glue Co.* v. *Oak Creek* [69] are opposed to the economics underlying *Pollock* v. *Farmers' Loan & Trust Co.*,[70] *Dobbins* v. *Com-*

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[68] Note 14, *supra*.

[69] 247 U. S. 321, 38 Sup. Ct. Rep. 499 (1918), 32 Harv. L. Rev. 634 *ff*.

[70] Note 58, *supra*.

missioners of Erie County,[71] and *Collector* v. *Day*,[72] and thus afford a convenient excuse for abandoning the decisions of earlier decades.[73]

Unfortunately for any such possibility, Congress insists on denying to the states the power to tax income from federal securities. It thereby requires the states to lend their aid to the federal borrowing power. There seems, therefore, a strong political argument in favor of continuing to forbid the United States to tax income from state securities. Indeed, the argument may be deemed an economic one. We may grant that the effect of exempting interest on state bonds from a general federal tax on net incomes is to confer a bounty on the state borrowing power. But this is not the whole of the story. Such bounty cannot be considered apart from the bounty which the states are required to bestow on the federal borrowing power, to the consequent restriction of their own taxing power. The principle on which these limitations are based is that the federal system requires that neither the state nor the nation exercise their undoubted powers to the detriment of the undoubted powers of the other. No application of this principle can be considered apart from the other applications. What is sauce for the goose should be sauce for the gander. It is a poor rule that does not work both ways. The states receive no more than fair economic treatment if, in return for the aid and comfort which they render the

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[71] Note 21, *supra*.

[72] 11 Wall. (U. S.) 113 (1871). This case held that a federal income tax cannot be applied to the income of a state judicial officer. The court regarded the exemption of state salaries from a federal income tax as the necessary correlative of the exemption of federal salaries from state taxation, Mr. Justice Nelson observing: "And if the means and instrumentalities employed by that government to carry into operation the powers granted to it are, necessarily, and, for the sake of self-preservation, exempt from taxation by the States, why are not those of the States depending upon their reserved powers, for like reasons, equally exempt from Federal taxation? Their unimpaired existence in the one case is as essential as in the other. It is admitted that there is no express provision in the Constitution that prohibits the general government from taxing the means and instrumentalities of the States, nor is there any prohibiting the States from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government. Of what avail are these means if another power may tax them at discretion? (11 Wall. (U. S.) 113, 127.)

[73] For suggestions that the later decisions furnish the ground for overruling the earlier ones, see note on Peck & Co. *v.* Lowe, and the Oak Creek case, in 4 BULLETIN OF THE NATIONAL TAX ASSOCIATION, 26.

federal borrowing power, they receive a corresponding advantage for their own borrowing power.

The same considerations apply to taxation of income from official salaries. In this field the Supreme Court may, if it wishes, overrule *Collector* v. *Day*,[74] and permit the inclusion of state salaries in the federal income tax, and overrule *Dobbins* v. *Commissioners of Erie County*,[75] and permit the states to tax the salaries of federal officials. A salary exempt from a tax which other salaries must bear is increased by that much. Now that we have a federal income tax, a $5,000 professorship in a state university yields more than a $5,000 professorship in an endowed institution of learning. In the absence of a state income tax, a $6,000 federal judgeship is worth no more than a $6,000 law practice. A state income tax makes the ermine more attractive than it was before. The law as it now stands makes the states and the United States undergo sacrifices, each for the benefit of the other. Neither government would suffer appreciably if the burnt offering were no longer required. But if it is required of either, it should be required of both. So long as Mr. Dobbins is exempt, Mr. Day should be also. The considerations which justify exempting either of them are political rather than economic. While from the political standpoint there is more reason to apprehend state encroachment on federal power than federal encroachment on state power, this can hardly justify a court in holding that a state tax on a federal salary interferes with a federal instrumentality, if a federal tax on a state salary is thought to be immune from criticism.

The conclusion to be drawn from our review and analysis of the decisions is that, in spite of cross currents and shifting winds of doctrine, the states will be permitted to continue the indirect encroachments on federal authority that have hitherto been sanctioned. They will be allowed to impose taxes that fall on interstate commerce and on the federal borrowing power, if they do it in approved ways. The decisions under the commerce clause may nearly all be referred to the judicial conviction that the federal system demands that the states shall not discriminate against interstate commerce, or indulge in forays on property or business beyond their borders, but does not demand that interstate commerce be relieved from proportionate contributions. The decisions which have permitted

[74] Note 72, *supra*.

[75] Note 21, *supra*.

state taxation which falls indirectly on the federal borrowing power are satisfactorily explained on the economic ground that they have not hampered that borrowing power. There is ample economic justification for the cases which have restrained the states from laying discriminatory taxes on United States bonds. For the other restrictions which the Supreme Court has placed upon the states we must be content with political rather than with economic reasons.

In choosing between competing political considerations, much depends on personal predilections. Two of Marshall's colleagues did not share his views that United States bonds must be exempt from state taxation. What Marshall's doctrine achieved was a protective tariff in favor of the infant industry of national credit. His fears that the nation might be destroyed if the view of the dissent had prevailed must be regarded as extravagant. But this does not question the fundamental wisdom of his judgment, particularly at the time when it was rendered. Congress plainly believes that the judgment is as sound to-day, since it demands the continuance of the protection which Marshall decreed. It is difficult to quarrel with the position that the powers of the nation shall be immune from the direct touch of the states. In determining the constitutionality of state taxation which falls directly on federal instrumentalities, we can readily forego nice analysis as to its economic effects. But an understanding of those effects is essential to a proper evaluation of the decisions which permit state taxation that falls indirectly on those same instrumentalities. Distinctions between direct and indirect effect which seem unsubstantial, when abstracted from the complete situation in which they play their part, are found to be useful implements for reaching desirable results. In permitting indirect encroachment on federal authority by the taxing powers of the states, the Supreme Court has been wise in its judgments. If its conclusions deserve more praise than does some of the reasoning by which they have been supported, the phenomenon is not peculiar to the particular problem which we have been considering.

The explanation of the unsatisfactory character of so much of the judicial reasoning here and elsewhere is easily discovered. Decisions which are dictated by the necessity of making a wise practical choice between competing considerations are seldom placed frankly

on that ground. Judges are loth to say: "We decide this particular case in this particular way because we think that this is the best way to decide it." Instead, they are prone to refer their judgment to some immutable principle inherent in the nature of things, or unalterably established by the authoritative judgments of their predecessors. In the realm of constitutional law, courts are fond of professing that it is not they that speak, but the Constitution that speaketh in them, even in settling such disputes as this study has chronicled, concerning which concededly the Constitution is silent. Where the Constitution is not wholly mum, it often speaks with such a still, small voice that only a bare majority of the court can hear its echo. Yet the judicial opinions seldom recognize the patent fact. So long as judges pose as automatons when they are in fact wise arbiters of public policy and practical expediency, they necessarily hide their wisdom under the bushel of a supposed constraining conceptualism, which confuses much that would otherwise be simple and clear. The wonder is that wisdom so generally finds its way and controls the actual adjudications which together make the law. This could hardly be, if doctrine played any such potent part in shaping the course of the decisions as the opinions of the judges would lead us to believe.

The judicial umpiring of the contests between the conflicting claims of the states and of the nation over the exercise of the taxing power has clearly not been controlled by any undisputed and compelling doctrine. That is why it has so greatly perplexed those who see in doctrine their only guide. To dispel the perplexity we must study the cases as practical adjustments of competing interests, each of which is entitled to a degree of consideration. The interest which will be accorded the preference in one situation may have to be determined in the light of the preferences which have been accorded in other situations. No single adjustment liveth to itself alone. In a federal system there must be reciprocal give and take between the whole and the several parts. It must often be impossible in particular instances to make an even apportionment of the giving and the taking. So it may be necessary to favor now one side, and now the other. The aim should be to strike as even a balance as possible in the whole account. This can never be done by pious invocation of some image which men choose to call "Sovereignty." It must be done, as it has been done, by applying human

intelligence to the enterprise of forecasting and evaluating the practical results from differing courses of action, and of choosing that course which leads to the result preferred. Marshall pursued a vain hope in thinking it possible to "measure the power of taxation residing in the State by the extent of sovereignty which the people of a single State possess and can confer on its government." We can, however, if we find it necessary, measure to a considerable degree the extent of sovereignty residing in the state, by finding what the official interpreters of the Constitution permit the state to do in the exercise of the power of taxation and of other governmental functions. "Sovereignty" is a way of stating results rather than a means of reaching them.

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